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IN THE

Supreme Court of the United States

October Term, 1954

GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY CO., DEBTOR,
Petitioner
v.
GEORGE C. MOORE, SR., *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit (and Brief in Support of Petition)

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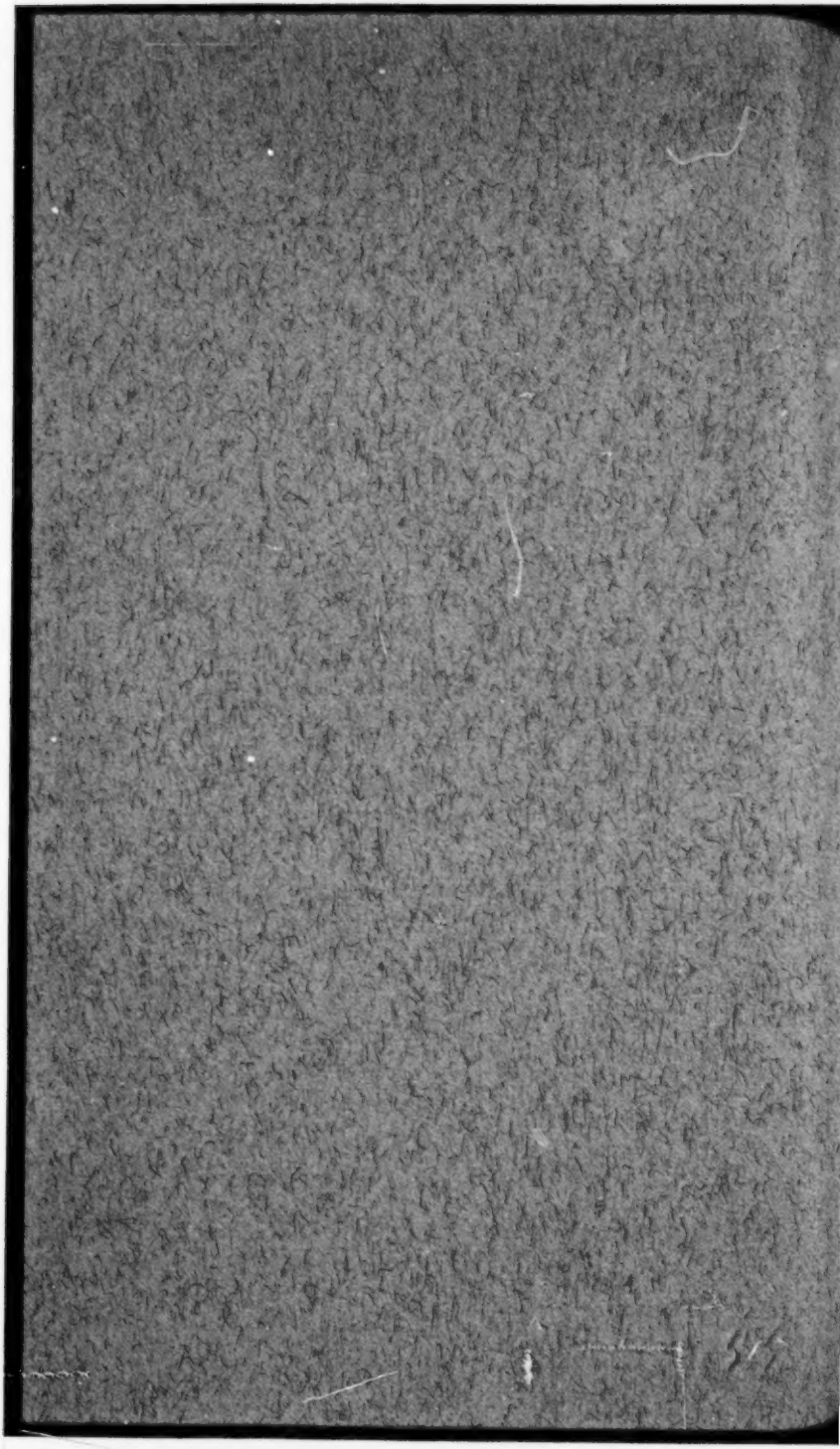

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To the United States Court of Appeals for the Fifth Circuit (and Brief in Support of Petition)

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

Opinions of the courts below:

This case originated in the United States District Court, Southern District of Texas, and was appealed to the United States Court of Appeals, Fifth Circuit. The trial judge filed three memorandum opinions, dated April 29, 1953 (Appendix p. 37), November 19, 1953 (Appendix p. 50), and

April 16, 1954 (Appendix p. 54). The opinion of the Court of Appeals is at page 57 hereof. The Court of Appeals opinion was published at —— F. 2d ——. The memorandum opinions of April 29, 1953 and of November 19, 1953 (without footnotes) were attached to the opinion of the Court of Appeals and published with it.

Jurisdiction of the Supreme Court

The judgment of the trial court was entered April 12, 1954. The judgment of the Court of Appeals was dated and entered April 22, 1955. Petition for rehearing in the Court of Appeals was denied by that court May 24, 1955.

Jurisdiction to review, by writ of certiorari, the judgments of the trial court and Court of Appeals is conferred on this court by section 1254 of Title 28 of the *United States Code*.

Questions Presented for Review

(1) Whether the law of Texas required respondent to exhaust his administrative remedies before filing suit against his employer.

(2) Whether this suit involved interpretation of the collective bargaining agreement between the railroad and the union representing plaintiff's group of employees so that exclusive jurisdiction was vested in the Adjustment Board under the Railway Labor Act.

(3) Whether an employee of a railroad subject to the Railroad Retirement Act who has accepted annuity under that Act, paid because he was physically disabled to perform the duties of his employment, can sue the railroad for not allowing him to work during the time for which he has accepted the annuity.

(4) Whether a railroad employee who requested the Railroad Retirement Board to determine his physical ability to perform his duties was bound by the Board's findings of physical disability (which findings were not set aside upon a direct attack as provided by law) and was precluded from showing he was able to work and from seeking damages against the railroad for not allowing him to work during the time the Retirement Board had found he was disabled.

(5) Whether respondent was discharged, and if so, whether such was arbitrary.

(6) Whether respondent was entitled to damages for wrongful discharge if the claimed wrongful discharge was an offer by the railroad to allow him to return to work if he would report to the doctor for examination and the doctor found him physically qualified, but respondent did not report for that examination.

(7) Whether respondent, an employee who was found by the company doctor and the trial court jury to be physically disabled for work on the day he applied to resume work, who unsuccessfully appealed to a higher official for reversal of the disqualification, for restoration to duty and for compensation for wages lost after the disqualification, who was found by the trial court jury to have been physically disqualified at the time of the decision of the higher official, and who further appealed to a different official, resulting in an affirmance of the original disqualification, which latter affirmance was made at a time the jury found the employee physically able to work, was entitled to damages for wages lost after the date the jury found he was able to work; that is, whether respondent's rights are to be determined as of the time he applied to resume work or as of the time of the decision on appeal.

Statutes Involved

The statutes which this case involves are various sections of the Railway Labor Act, 45 U.S.C.A. 151, et seq. and of the Railroad Retirement Act, 45 U.S.C.A. 228a, et seq. These are lengthy and are set out in the Appendix, pp. 70, 72.

Statement of the Case

G. C. Moore, Sr., respondent here, was employed by petitioner as a conductor. In 1947 he applied for disability annuity under the Railroad Retirement Act, 28 U.S.C.A. 228a, et seq., but such was denied since he was not disabled from any regular employment. His then length of service was only sufficient to entitle him to disability benefits if he was incapacitated as to *any* regular employment. In August 1949 judgment was entered in a damage suit filed by him against petitioner awarding him damages for personal injuries. Right after the entry of this judgment Moore voluntarily "laid off" work and either made a new application, or renewed his previous application, for disability benefits under the Retirement Act. By that time his length of service was such as to entitle him to disability benefits if he was disabled for work in *his* regular employment. In December 1949 the Railroad Retirement Board found he was disabled for work in his regular employment and he was awarded benefits. This was found and awarded as of the date he "laid off". He continued to receive and accept these benefits up to the time of the trial of this case.

Moore stayed off railroad work until February 16, 1951, some 18 months, at which time he applied to A. F. Judd, petitioner's superintendent, to resume service, stating that he felt he had recovered to the extent he was able to work. Judd sent Moore to petitioner's chief surgeon, Dr. C. M.

Sublett. The doctor examined Moore and reported to Judd that he found certain specified disabilities and since these were the conditions for which Moore had been retired, the doctor recommended against Moore's resumption of duty. On the basis of this, Judd declined to allow Moore to resume work.

Moore was examined by other doctors. He secured reports thereof and he offered these to Judd but the latter relied on the chief surgeon's report.

Moore appealed to Ralph Johnson, assistant general manager of petitioner, as to Judd's refusal to return him to service but Johnson said he would be governed by Dr. Sublett's disqualification.

Moore then wrote to E. C. Sheffield, successor to Johnson as assistant general manager of petitioner, presenting his appeal of his claim for reinstatement with seniority rights unimpaired and compensation for time lost following Judd's refusal to allow him to work. Sheffield wrote Moore stating that his claim for time lost was declined, but that if Moore would again report to the doctor and after examination if the doctor advised that Moore was then physically fit to resume duty as conductor, it would be satisfactory for him to return to service if he passed the safety rules examination. This letter appears in the Appendix, p. 34. Moore did not report to the doctor for examination. This letter was written fifteen months after Dr. Sublett's prior examination.

Moore then wrote T. Short, chief personnel officer of petitioner, appealing, "as provided by the Railroad Labor Act", from Sheffield's decision (R. 326). Short denied the appeal. He referred to Sheffield's letter to Moore as to the steps necessary for Moore to return to service and stated

that the offer made by Sheffield "still stands." Moore did not attempt to secure the medical examination by the doctor.

During the above proceedings, Moore was communicating with the Railroad Retirement Board as to his physical condition and the disability payments. In August, 1951, Moore wrote the Board that Dr. Sublett had disqualified him for work March 2, 1951 but that other doctors found he could do his job. He requested that the "Board have me examined to see if I am still entitled to my annuity" (R. 44-45). The Board had Moore examined and in December 1951 advised him that they found he was still physically disabled. This letter is in the Appendix, p. 33. This was after Johnson's affirmance of Judd's refusal to return Moore to service.

In July 1952, the Board had Moore examined at the Veteran's Administration Hospital by many specialists so that it could reconsider his eligibility for disability benefits. After the examinations, the Board advised Moore that their records showed he had been granted an annuity principally upon the basis of arthritis, that the specialized examinations showed substantially the same disability which had been present when the claim for benefits was approved and that there was no change of status as to his right to the disability benefits. This letter appears in the Appendix, p. 36. This was in August 1952 some 18 months after he applied to Judd to return to service and about two and one-half months after Sheffield's denial of the appeal and offer to allow his return to service of the doctor found him physically qualified.

This suit was filed in February 1953 for damages for several alleged wrongful discharges. It was claimed that Judd's requirement of a physical examination, the chief

surgeon's examination and report, being wrongful, and Judd's reliance thereon, and each of the decisions of the other officials were wrongful discharges.

Defendant moved for summary judgment by two separate motions. These were over-ruled, but one ground was carried along with the case.

The jury found that Moore was not physically able to work on: (1) the date the chief surgeon examined him; (2) the date Judd did not consider the reports of the outside doctors and, relying on Sublett's report, refused to return him to service; and (3) the date Johnson did not allow him to return to service. The jury found Moore was able to work on the date of Sheffield's letter which denied his claim for time lost but offered to allow him to return to work if the doctor passed him for service. The jury found that Dr. Sublett did not act arbitrarily in finding Moore disabled but that petitioner's refusal to return him to service was arbitrary on the date of Sheffield's letter. Damages from the date of this letter to the trial were found to be $6,960.

Petitioner moved for judgment on the verdict but the court entered judgment against petitioner for the amount of the jury verdict. On appeal, the Court of Appeals affirmed that judgment and over-ruled petitioner's motion for rehearing.

Grounds of Jurisdiction of the Trial Court

The trial court had jurisdiction by virtue of the amount in controversy and (1) diversity of citizenship and (2) rights under federal statutes, particularly the Railway Labor Act and the Railroad Retirement Act. The Court of Appeals held that jurisdiction existed only by virtue of diversity of citizenship.

Considerations Governing Review Under Supreme Court Rule 19 Section 1 (b)

The decision of the Court of Appeals is in conflict with the law of Texas as announced by the state courts:

1. The Circuit Court of Appeals and the trial court held that respondent was not required to exhaust his administrative remedies, under the laws of Texas. The Texas Court of Civil Appeals in January of 1954 decided the case of Wilburn v. Missouri-Kansas-Texas Railroad Company of Texas, 268 S.W. (2d) 726, holding, on rehearing of that case reported at Page 731, et sequentia, that a railroad employee was required to exhaust his administrative remedies in a suit for alleged wrongful discharge. That Court, in the original opinion, which was overruled on a motion for rehearing, cited the case of T&NO v. McCombs, 183 S.W. (2d) 716 which was relied on by the trial court and by the Circuit Court of Appeals in the present case. However, on rehearing the Court obviously disregarded the opinion of the Supreme Court of Texas in the McCombs case because of the decision of the Supreme Court of the United States in Transcontinental and Western Air Lines v. Koppal, 345 U.S. 653, the decision in which intervened between the time of decision in the McCombs case and the time of decision in the Wilburn case, and was decided long after the case of Moore v. Illinois Central, 312 U.S. 630, which the Supreme Court of Texas had followed, according to its interpretation of that case, purportedly for the sake of uniformity.

2. The Court of Appeals held that respondent, who was not allowed to resume performance of duties because petitioner's chief surgeon disqualified him, was discharged. The Wilburn case, 268 S.W. 2d at 734, held in a similar case there was no discharge. "There is a wide difference between a discharge because of

affirmative action and a disqualification on account of physical disability . . . . " See also footnote at pages 734-5.

The Court of Appeals decision is in conflict with *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325, which held that a railroad employee is required to exhaust his administrative remedies if the local law requires that, and cited, in footnote 3, Texas law as requiring use of the administrative procedures.

The decision of the Court of Appeals, in not holding that respondent was bound by the findings of disability made by the Railroad Retirement Board and not precluded from claiming damages by his acceptance of benefits under the Railroad Retirement Act is in conflict with *Scarano v. Central Railway Co. of New Jersey* (3rd Cir.), 203 F. 2d 510.

Argument

This case should not have been considered on the merits.

A. *The Adjustment Board under the Railway Labor Act had exclusive jurisdiction.*

1. Respondent was required to, but did not exhaust his administrative remedies.

The rules of law as to whether a discharged railroad employee who claims his discharge was wrongful may immediately file suit in the courts or whether he must exhaust his administrative remedies have been recently announced by the court. *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653, 661-2 states:

"* * * Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable state law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law.

"On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so."

Thus even conceding, for the purposes of this discussion, that respondent was discharged (although we do not believe he was) the suit should have been dismissed, as was the *Koppal* case, if Texas law requires the exhaustion of administrative remedies.

The complaint upon which the case was tried alleged that respondent was employed under a collective agreement of which the Railway Labor Act (45 U. S. C. A. 151, et seq.) was a part. Under Texas law such act was a part of the contract. *Wilburn v. Missouri-Kansas-Texas R. Co. of Texas*, Tex. Civ. App., 268 S.W. 2d 726, 733.

Article 21 (a) of the collective bargaining agreement provided:

"Conductors shall not be discharged or otherwise disciplined without sufficient cause. In case a Conductor believes he has been unjustly discharged or disciplined, he shall have the right within 10 days to make a complaint in writing, and shall, upon request of him-

self or a committee of Conductors, be granted a hearing within 10 days by the proper officials. If dissatisfied with the decision of said officials appeal may be made to higher authority. In case he has been unjustly discharged, he shall be reinstated and paid for the time lost; if otherwise disciplined unjustly, it shall be corrected." (R. 248).

The Railway Labor Act, 45 U.S.C.A. 151, et seq. provides: Section 152:

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute. . . . "

* * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, * * * to specify a time and place at which such conference shall be held: Provided, * * * that nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

Section 153:

"First. There is established a Board, to be known as the 'National Railroad Adjustment Board' * * *.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application

> of agreements concerning rates of pay, rules, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *."

It is undisputed that after Moore appealed the decision of the superintendent to the assistant general managers and to the chief personnel officer, he did not complete the administrative procedures by taking the case to the Adjustment Board as provided by the above act.

The contract, including the Railway Labor Act, which was part of it, provided a procedure part of which was invoked. It contemplated that the interpretation of the contract and the settling of disputes should be by persons in the railroad industry and the Adjustment Board. It was never contemplated that a jury, or a judge, not intimately familiar with railroad usages, requirements and terminology would pass upon matters requiring such for a proper solution. As was said in the *Wilburn Case*, 268 S.W. 2d 726, 734:

> " * * * It is to the public interest, as well as to the interest of other employees of the defendant, that the physical capacity for discharging the duties of the employment be maintained in accordance with the administrative procedure which has been provided for in the contract between the Brotherhood and the defendant. *Since such administrative procedure requires a condition precedent and prescribes a remedy for any breach, the plaintiff is bound to pursue such contract*

> *in the appropriate tribunal.* Where determination has been left to an administrative body by statute (and the contract in this case was executed pursuant to a federal statute), it is not the province of courts to substitute their judgment or encroach upon the administrative body. *Gray v. Powell,* 314 U.S. 402, 62 S. Ct. 326, 86 L. Ed. 301; *Securities and Exchange Comm. v. Chenery Corp.,* 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626." (Emphasis added)

Texas law requires that a person exhaust available administrative remedies before resorting to the courts.

> " * * * It is well settled that, where contracting parties either agree or are required by law to resort to a designated tribunal for the adjustment of controversies, they must exhaust such remedy before resorting to the courts for redress." *Glass v. Hoblitzelle,* Tex. Civ. App., 83 S.W. 2d 796, 802, quoted in footnote 3 of *Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325.

See also *Matlock v. Gulf C. & S.F. Ry. Co.,* Tex. Civ. App., 399 S.W. 2d 1056; *St. Louis, B. & M. v. Booker,* Tex. Civ. App., 5 S.W. 2d 856, cert. den. 279 U.S. 852, 45 S. Ct. 348, 73 L. Ed. 995; *Cousins v. Pullman Co.,* Tex. Civ. App., 72 S.W. 2d 356; *J. E. Wyatt v. Kansas City Southern Ry. Co.,* Tex. Civ. App., 101 S.W. 2d 1082 (all railroad employment cases); and *Southwestern Associated Tel. Co. v. City of Dalhart,* Tex. Civ. App., 254 S.W. 2d 819.

We therefore, submit that respondent was by law required to exhaust his administrative remedies; the court should have so held and dismissed this case.

2. The dispute involved the interpretation of the contract.

Respondent's whole case was that under the collective bargaining agreement he was entitled to return to service, the defendant did not allow him to do so, and this was a discharge. There was no proof of any refusal to allow plaintiff to work except on occasions when the railroad denied this on the basis that he was not physically able to do so. The collective bargaining agreement does not contain specific provision as to this, and it must therefore be interpreted to determine whether that is part of the agreement.

A Special Adjustment Board considered another dispute, quite similar except that the claim was for time lost instead of damages for discharge, between petitioner and another of its conductors, M. C. Barnes. The identical collective bargaining agreement was involved. The Board award (which appears in the appendix, page 61) held that where the carrier had doubt as to the physical ability of a conductor to perform his duties, a requirement that he be examined by the railroad's chief surgeon was proper. Because Barnes refused to report for such an examination, his claim for time lost was denied. But in our case, Moore was told that if he wanted to work he should go to the chief surgeon and if the doctor passed him it would be satisfactory for him to resume service. The court held this was a discharge—a denial of work when he was eligible for work and capable of working. The court in our case not only interpreted the agreement which the decisions of this court say a court should not do, but interpreted it contrary to the rulings of the Adjustment Board, which has exclusive jurisdiction to make such an interpretation.

Under the Barnes decision by the Special Adjustment Board, the employee was not entitled to work (not entitled

to compensation for not being allowed to work) unless and until he submitted to a physical examination by the company doctor—that was a condition precedent to his right to work. In our case, Moore did not show himself entitled to work, he did not satisfy the condition precedent, because he failed to report to the chief surgeon as requested. He therefore should not have been awarded damages.

The First Division of the National Railroad Adjustment Board, with Hon. J. Glenn Donaldson as referee, in Award No. 13859, *Order of Railway Conductors v. The Delaware and Hudson Railroad Corporation* decided a somewhat similar situation. That award is included in the appendix, page 62. Conductor Bovit filed claim for compensation. The collective bargaining agreement provided for periodic examination for color perception, acuteness of vision or hearing, but contained no provision for general physical examination. The carrier, without the agreement being changed, issued a rule that all conductors would have to take periodic physical examinations. Opportunity to do this was given so that work time would not be lost, but Bovit did not take advantage of that. He was ordered to report to the doctor. He filed claim for a day's pay for the day he was examined. In denying the claim, the Board said:

> "Our attention has not been called, nor does our examination of the current rules reveal, any negotiated rule dealing with physical examinations either upon entry into service or upon return from sick or disability leave. Does it follow that the carrier is without right in requiring the same because not negotiated? We think not. We must bear in mind the nature of services rendered; the general practice prevailing in industry and in particular the transportation industry, and the carrier's strict legal liability to the public for

> safe passage of its trains. Continued good sight and hearing are only a part of the physical attributes which must continuously attach as a condition of employment to those entrusted with the lives and property of the patrons and employer. We find that the institution of a regular, periodic, physical examination program to assure the continued good health of its employees in the interest of the protection of the public and the equipment handled is a managerial function and that the same may be unilaterally imposed. (Awards 7663, 8605). As in the case of all managerial prerogatives however, exercise of the right must be reasonable. Under the circumstances here present, we cannot say the carrier acted unreasonably."

We say that equally petitioner's requirement of a physical examination of respondent who had been disabled was not unreasonable.

The court below had to interpret the contract. It did not have the jurisdiction to do so.

Respondent contended that under the agreement the railroad did not have a right to require a physical examination, even though admittedly he had been physically disabled. The requirement of this examination was the first "wrongful discharge" alleged by plaintiff.

Respondent contended that defendant was not entitled, under the agreement, to rely upon the decision of the chief surgeon as to his ability to work.

Respondent contended he had a contract for life-time employment.

Respondent contended that upon a dispute arising as to his physical ability the matter should have been submitted to a board of three doctors. This was not part of the writ-

ten agreement (made in 1924) but plaintiff took the position that by custom it had become a part of the agreement. Therefore there was a question as to what provisions the agreement contained.

Respondent's claims presented many questions of interpretation of the collective bargaining agreement. This court has held that where there are such questions, the Board of Adjustment has jurisdiction to the exclusion of the courts. *Order of Ry. Conductors v. Pitney,* 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318; *Slocum v. Delaware L. & W. R. Co.,* 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795.

B. *Respondent, by accepting disability benefits between the time he sought to resume his duties and the time of trial is precluded from claiming damages for not being allowed to work during that time.*

It is undisputed that Moore each month continued to receive and accept the disability benefits from the Railroad Retirement Board after he sought to resume work in February 1951, after he filed this suit, and up to the time of the trial. Moore testified that he knew that he was only to receive the disability benefits if he was disabled and that the Board should discontinue the pension if he had recovered. (R. 83) This was on deposition since the trial court would not allow evidence of it at the trial. At the trial the court reconsidered but overruled the petitioner's motion for summary judgment based on this. (R. 918)

See 19 *Am. Jur.* 682, Estoppel, wherein it is said:

"Sec. 64. *Acceptance of Benefits.*—Estoppel is frequently based upon the acceptance and retention by

> one having knowledge or notice of the facts of benefits from a transaction, contract, instrument, regulation or statute which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions, and it has been said that such cases are referrable, when no fraud either actual or constructive is involved, to the principles of election or ratification rather than to those of equitable estoppel. The result produced, however is clearly the same and the distinction is not usually made. Such estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction in so far as it imposes a liability or restriction upon him, or, in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation. It finds application in many different fields and under a wide variety of circumstances, * * * It is also applied * * * to prevent one who accepts the benefit of a judgment or decree from questioning its validity or opposing the enforcement of its terms."

See also 42 *Am. Jur.* 428, Public Administrative Law, sec. 98, wherein it is said:

> "One who receives and retains benefits under a rule of a commission may be estopped to attack its validity."

Plaintiff in accepting the monthly benefits took the position that he was disabled. He has now taken the position that he was not disabled. The courts do not allow this. *Scarano v. Central Railway Co. of N. J.* (3rd Cir.), 203 F. 2d 510. The trial judge instructed the jury that they were not to consider the fact that Moore was receiving the disability benefits (R. 1027).

This point has been passed on, adversely to respondent, by the Third Division, National Railroad Adjustment Board,

with the assistance of Hon. H. Nathan Swain as Referee. In *Order of Railway Telegraphers v. Pennsylvania Railroad*, Award Number 2210, the Board denied the claim of a telegrapher on the ground that it was inconsistent with his prior position. Nednein was the senior unassigned operator. He was assigned to a temporary vacancy but the relief day of that position was filled by the regular relief man. Nednein was not assigned to another job on such relief day and he filed a claim for and was paid at the regular rate for not being given other work when the regular relief operator was working on this position. Thereafter when the regular relief operator filled that job, Nednein was given other work. In this claim, he sought overtime pay for being assigned to and required to work on other jobs on the relief days of this temporary vacancy. The claim was denied, the Board saying,

> "That claim on which Nednein was paid (the prior claim) was entirely inconsistent with his present claim. If while on temporary assignment to one position, he was, on the relief days of that position, entitled, as the senior available extra operator, to assignment to other temporary vacancies he could not claim time and one-half for working on the relief day assigned to his position. If on such a temporary assignment the position was *his* position on the relief day, then on that day he could not be the senior unassigned extra operator." (Parenthetical matter added)

A copy of such award is in the Appendix, page 64.

In the Court of Appeals, respondent appended to his brief Interpretation of Award 14987 by the First Division, National Railroad Adjustment Board. That Interpretation is in the Appendix, p. 67. Respondent relied upon that as showing that the Board would allow a claim for time lost

by a conductor while held out of service by the carrier even though he had received benefits under the Railroad Retirement Board. However, such decision is not applicable here because the benefits there involved were not *disability* benefits so there was no inconsistency between the claim of entitlement to benefits and the claim of being capable and eligible for work. Further, the Interpretation stated:

> "In discussing what would result if an affirmative award were granted and claimant had received prior to such time annuity from the retirement board, it was agreed that *he could not be paid from two sources for the same period*, and that he would, in event his claim should be allowed, be required to return to the retirement board any amounts so received during the period not in service of the carrier and when not paid by the carrier. The award assumed there would be an adjustment of this matter so that claimant would not have the benefit of both sources of payment." (Emphasis added)

Respondent has not stated he would return to the Retirement Board the amount of benefits he received for any period for which he may recover damages in this suit. His brief in the Court of Appeals was that the Retirement Board should not require him to do this. Unlike the award of the Adjustment Board, the judgment herein was not on the basis that he would make refund and was not on the basis that he would not be paid twice for the same period.

C. *Respondent was bound by the findings of disability made by the Board and the court should not have heard evidence as to his physical condition.*

Respondent, plaintiff in the trial court, made a showing that subsequent to each of the actions which he alleged was

a wrongful discharge, the Railroad Retirement Board, on respondent's own application or at his instigation, inquired into respondent's physical condition. August 8, 1951 (after all of the alleged wrongful discharges except Sheffield's and Short's letters), Moore wrote the Board making request "to have me examined to see if I am still entitled to my annuity." (Appendix p. 33).

The Board had Moore examined and advised him he was still found to be disabled. This letter is at page 33 of the Appendix. In 1952, the Board had specialized examinations made to determine Moore's physical condition. Following these examinations, the Board found (and advised Moore) that he was still disabled from performing his duties as a conductor. The Board's letter is in the Appendix, p. 36.

Moore did not appeal from, or file any direct attack on, these findings.

The Railroad Retirement Board is given authority to determine whether an employee is disabled and entitled to benefits. 45 U.S.C.A. 228 b (a) 4 provides:

> "The Board shall determine whether his condition is disabling for work in his regular occupation . . ."

45 U.S.C.A. 228 b (a) 5 gives the Board the power and duty to determine whether the disability continues or ceases:

> "Such satisfactory proof shall be made from time to time as prescribed by the Board, of the disability . . . and of the continuance of such disability . . . If before attaining the age of sixty-five an employee in receipt of an annuity . . . is found by the Board to be no longer disabled . . . his annuity shall cease . . ."

Moore was less than sixty-five years old.

The Board under 45 U.S.C.A. 228 j (b) 1, is given general power to administer the Act including the above provisions. That section further provides that the decisions of the Board upon questions of law and fact shall not be subject to review by any other administrative or accounting officer. 45 U.S.C.A. 228 k provides that decisions of the Board as to original eligibility for disability benefits and continuance of disability and eligibility for benefits shall be subject to judicial review only as provided in chapter 11 of 45 U.S.C.A. The provision for review is 45 U.S.C.A. 355(f) which provides for a bill of review *against the Board* upon which

> "The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. *No additional evidence shall be received by the court,* but the court may order additional evidence to be taken before the Board . . ." (Emphasis added).

Petitioner objected to jurisdiction and to the court hearing evidence as to Moore's physical condition and disability or ability to work. In spite of the above provisions and objection, the trial court heard evidence and entered judgment on the basis that May 29, 1952, Moore was able to work even though the Board had determined that Moore was not able to work in August 1952 and had been so disabled since August 1949.

Further, this action was an indirect attack upon the findings of the Board and an unauthorized procedure for review of the decision.

Consideration of the merits of the case showed respondent is not entitled to recover.

A. *Respondent was not discharged, much less wrongfully discharged, and therefore should have been denied relief.*

The only jury findings upon which the judgment was entered were (1) respondent was physically able to perform his duties May 29, 1952; and (2) petitioner's refusal to permit him to return to service was arbitrary on May 29, 1952. The jury found against respondents as to his physical ability to work on earlier dates that were submitted to the jury.

The date of May 29, 1952 was the date petitioner's assistant general manager wrote respondent. There was no evidence as to any other transaction or communication between the parties on that date, so whether Moore was discharged and whether that discharge was arbitrary, must be determined on the basis of that letter. For the convenience of the court, the full letter is set out in the Appendix,p. 34.

The letter of May 29, 1952 did two and only two things:

(a) It denied Moore's appeal from the decision of the superintendent refusing to allow him to return to service and would not reinstate him as of the date he applied to Judd or recognize his claim for earnings lost while held out of service. There can be no dispute as to the propriety of this action since the jury found that Moore was disabled at the time he applied to Judd and on the other dates prior to this letter.

(b) It offered to allow Moore to return to service if he would report for a physical examination, the doctor found he was qualified and he passed the safety rules examinations. Moore did not complain of the requirement of a

safety rules examination. All employees are periodically required to pass such an examination (R. 323)

Therefore, the dispute is reduced to a determination of whether a requirement of an employee, who had voluntarily retired because of disability, that he pass a physical examination to show ability to work is a discharge and if so, an arbitrary discharge. Petitioner submits that it is neither.

Respondent's whole case was for wrongful discharge. He did not sue for damages for being held out of service, but for damages because he was discharged. A "discharge" is a termination of the employer-employee status. It is a permanent and final separation. It is diametrically opposed to any concept that the employment status continues to exist, even in a suspended state as to the performance of duties. Petitioner's acts were not consistent with a "discharge" or a *cessation* of the employment relationship. They, and each of them, were consistent with and only with a continuation of the employment status, but a suspension of performance of work by respondent because he was physically disabled. The suspension was only to be during his disability.

Respondent applied for and was granted free railroad transportation for himself and his wife. This he would have a right to as an employee, active or retired. He would not have the right to it as a discharged employee or during any time after the employment status had been *terminated* by discharge or otherwise.

On May 29, 1952, the date of the so-called "discharge", petitioner advised respondent that it would be satisfactory for him "to resume duty as conductor" if he was physically

fit. He was not offered employment, but was offered an activation of the suspended, not terminated, relationship. In fact, respondent offered evidence that under petitioner's employment rules, respondent could not then be hired because of his age.

On June 25, 1952, petitioner's chief personnel officer, T. Short, wrote Moore that

> "Mr. Sheffield advised you in his letter of May 29, last paragraph as to what would be necessary for you to do in order to return to service.
>
> "This offer made by Mr. Sheffield still stands. (R. 331-2)

This again is consistent with a continuation of the employment status and inconsistent with a prior discharge.

The suspension of the status had originally been sought by respondent by his taking leave of absence and securing annuity for disability. His application in February 1951 to reactivate the relationship was correctly declined because he was still disabled, as the jury found. If Moore had reported to the chief surgeon after receiving Sheffield's letter of May 29, 1952, or after receiving Short's letter, it is at least possible that the doctor would have found him qualified and he would have been allowed to resume service. There was a period of more than fifteen months between Dr. Sublett's examination of Moore when he sought to return to service and Sheffield's letter. This was just slightly less than the period between Moore's laying off and applying for his pension and his application to resume service, eighteen months. Moore claimed he recovered in the eighteen months, but the doctor and the jury disagreed with him. Possibly

the doctor would have agreed with him at the date of Sheffield's letter. In any event, respondent did not sustain the burden of proof which he had of showing the contrary.

The trial court in giving his charge to the jury did not consider the requirement of a physical examination of Moore as unreasonable or as constituting a discharge. Respondent had claimed that petitioner's superintendent had discharged respondent by requiring him to submit to the examination. This contention was not submitted to the jury.

Therefore it seems to us that, until the time for entry of judgment the holding was that the requirement of a physical examination of a person theretofore disabled was reasonable and not a discharge, but at and since such time the requirement for examination was a discharge. The court entered judgment on the basis that respondent was discharged May 29, 1952. Declining his claim for time lost before that could not have been a discharge since he was theretofore disabled and there was no valid claim. Stating that it would be satisfactory for him to resume service could not be a discharge. Therefore, by elimination, the court must have held that the condition upon the offer, the examination, was the discharge. By the court's own prior decision and the authorities cited above that requirement was reasonable and it should not be allowed as a ground of recovery.

This court said in *Transcontinental & Western Air v. Koppal*, 345 U.S. 653, 661, 73 S. Ct. 906, 910, 97 L. Ed. 1325, that a railroad employee

> "may resort to his action at law for alleged wrongful discharge if the state courts recognize such a claim."

Texas courts do not recognize that there is a discharge, or a right of action therefor, in the fact situation here presented and therefore respondent should not have been allowed a recovery.

In *Wilburn v. Missouri-Kansas-Texas R. Co. of Texas*, Tex. Civ. App., 268 S.W. 2d 726, an employee sued for alleged wrongful discharge. Wilburn voluntarily "laid off" because of illness. Later he applied to resume service and the company doctor did not pass him. He claimed the refusal to allow him to work was a discharge. But the court held that a disqualification because of physical disability is very different from a discharge, and the employee's only remedy under Texas law would be by mandamus to compel a re-examination.

The courts below incorrectly determined that under Texas law, respondent could sue for wrongful discharge.

B. *Since respondent did not attempt to return to work on or after the date the jury found he was able to work he should not recover damages.*

1. Respondent did not report for examination.

Petitioner's assistant general manager, by the letter of May 29, 1952 advised Moore that it would be satisfactory for him to return to service if he would report for and pass physical examination and pass the safety rules examination. (Appendix, page 34.) He did not report for that physical examination. R. 322).

In connection with petitioner's motion for summary judgment there was submitted a decision by the Board of Ad-

justment in the *Barnes* case. That decision is included in the Appendix, page 61. The memorandum opinion of November 19, 1953 cites that decision as holding that where the evidence showed serious doubt as to a conductor's ability to satisfactorily perform his duties the carrier's request for physical examination by the chief surgeon of the carrier was not unreasonable.

But even though petitioner, after verdict, moved for judgment on this ground, the court entered judgment for respondent. That was clearly erroneous. Petitioner made an offer to let Moore resume work if Moore would show himself able to work. Moore made no effort to meet that condition and therefore he should have been denied relief.

2. Failure to qualify for work defeats respondent's claim for damages.

The Adjustment Board, under the Railway Labor Act, does not have jurisdiction of a damage claim for wrongful discharge. But the point has been presented in a claim for time lost while held out of service. The Barnes Claim, Appendix, page 61, was presented against petitioner by the Order of Railway Conductors (which had made the collective bargaining agreement on which respondent based his claim). Barnes, petitioner's conductor, was out of service, although not retired, because of his health. He applied to the superintendent to resume service. The superintendent advised Barnes that it would be necessary for him to report to Chief Surgeon Sublett for physical examination before he would be permitted to resume work. Barnes claimed that a doctor of the employees' hospital association had examined and treated him, and had found he could work. He claimed that it was wrong to require him to submit to an examination by the railroad doctor. He did not report

for the examination. He filed claim for the time he lost between applying to resume service and his securing a pension under the Retirement Act.

The decision said:

> "Where, as here, there is a perceptible deterioration in physical condition of degree and significance sufficient to throw serious doubt on conductor's physical capacity to satisfactorily perform his duties, a request that he undergo a physical examination by *carrier's physician* before being permitted to resume service is not improper." (Emphasis added)

This in an interpretation of the particular agreement (which is within the exclusive jurisdiction of the Board, *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795; *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325) the Board held that the carrier could require an employee to submit to examination by its doctor when there was doubt as to ability to work. There was such a doubt in this case. Moore had been granted pension because of disability and the jury found he was disabled when and after he applied to resume service.

The *Barnes* case that an employee cannot claim damages for time lost because he did not report to the doctor as requested, is on the premise that he was not entitled to work. Similarly respondent was not entitled to work because of his refusal to report for examination. He should not have been granted relief for not being allowed to do what he was not entitled to do.

To the same effect see the decision of the National Railroad Adjustment Board, First Division, as to conductor

Bovit, discussed at page 15 hereof and appearing in the Appendix, page 62.

The court below erred in (1) assuming jurisdiction and (2) in not following the Board's interpretation of the collective bargaining agreement.

3. Respondent did not apply to resume service on May 29, 1952 and therefore there could be no refusal then to allow him to work and no discharge.

Sheffield's letter of May 29, 1952 was on an *appeal* from the superintendent's refusal to allow him to resume service in February 1951. That letter was in answer to Moore's letter to Sheffield of May 1, 1952, which began:

> "Herewith, I respectfully present my *appeal* to your office for consideration and handling of my claim for reinstatement with seniority rights unimpaired, and full compensation for time lost while held out of service, by the superintendent at Kingsville." (R. 312 Emphasis added)

Nowhere did that letter (R. 312-317) apply for present resumption of service—it was solely on the basis he was able to work and should have been allowed to work when he applied to the superintendent. But the jury found he was wrong in this contention.

Prior to trial, petitioner, in answer to respondent's request, admitted that superintendent Judd was the proper official to whom respondent should make request that he be permitted to resume performance of duty. (R. 193, request 21 and answer) On May 29, 1952 respondent made no request of the superintendent to resume service.

Since the action complained of was on an appeal and since the appealed decision was correct, no relief should have been granted.

We therefore conclude that the District Court and the Court of Appeals erred in applying the law of Texas to the question of whether respondent was required to exhaust his administrative remedies, in holding that the district courts have jurisdiction, in not holding that this case should have been dismissed as one that is within the exclusive jurisdiction of the Adjustment Board under the Railway Labor Act, in not holding that respondent was bound by the Retirement Board findings of physical disability of respondent, in allowing evidence of, and court finding as to, respondent's physical condition, in not holding the respondent, by the acceptance of disability annuity from the Retirement Board was precluded from claiming he was not disabled and from seeking damages from his employer for not being allowed to work during the time for which he had accepted annuity for being disabled, and in holding that respondent was wrongfully discharged.

We further conclude that this is a case in which writ of certiorari should be granted under Rule 19, Section 1(b) of this court.

We pray that this application for such writ be granted and upon hearing the judgments of the court below be reversed.

Respectfully submitted,

PALMER HUTCHESON,
Attorney for Petitioner
Houston, Texas

LESLIE S. LOCKETT
Of Counsel
Corpus Christi, Texas

APPENDIX

P. O. Box 264 Kingsville, Texas August 8, 1951

Mr. A. R. Wells
Director of Retirement Claims
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

Dear Sir:

I am anxious to resume my duties as railroad conductor and believe that I am physically qualified to do so.

March 2, 1951, Dr. G. M. Sublett, the St. L. B. & M. Chief Surgeon at Kingsville, Texas, recommended that I not resume the duties of my occupation. After securing a copy of Dr. Sublett's recommendation, I was examined by doctors in Houston, San Antonio and Kingsville. They did not find any conditions which indicated I was unable to perform the duties of my regular job. In fact their examinations showed that I am able to perform the duties of my job.

In view of the conflicting information, I would like to request that the Railroad Retirement Board have me examined to see if I am still entitled to my annuity.

Very truly yours,

GEORGE C. MOORE

United States of America
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

Bureau of Retirement Claims

December 26, 1951

Mr. George C. Moore
P. O. Box 264
Kingsville, Texas

In reply refer to R.R.B. No. A-338174

Dear Sir:

At your request we have submitted you to additional general and specialized examinations. The results of these examinations, together with the examination conducted on you on March 2, 1951 by C. M. Sublett, M. D., Chief Surgeon. The St. Louis, Brownsville and Mexico Railway, were given careful consideration. According to our records, you are still considered permanently disabled for work in your regular occupation.

We have no jurisdiction over the employment practices of the railroads and whether or not you are rehired is purely a matter between you and your former employer.

Very truly yours,
(S.) A. R. WELLS,
(A. R. Wells)
Director of Retirement
Claims

Guy A. Thompson, Trustee
Missouri Pacific Lines
Gulf Coast Lines
International-Great Northern

E. C. Sheffield
Assistant General Manager

Palestine, Texas, May 29, 1952

Mr. G. C. Moore, Sr.
P. O. Box 246
Kingsville, Texas

Dear Sir:

Your letter of May 1 appealing for consideration for re-

instatement with seniority unimpaired and full compensation for time lost while held out of service by superintendent at Kingsville.

Your claim for time lost while being held out of service by superintendent at Kingsville is declined as Dr. C. M. Sublett, our chief surgeon, examined you and disqualified you for service as conductor and we received notice from the Railroad Retirement Board under date of December 16, 1949 that you were granted full annuity under section 2(a), sub-section 4(ii). It is my understanding that you are still receiving annuity from the Railroad Retirement Board.

If you will again report to chief surgeon Dr. C. M. Sublett at Kingsville, for physical examination and after examination if Dr. Sublett advises that you are now physically fit to resume duty as conductor, it will be satisfactory for you to return to service provided you pass the other requirements with the understanding that you will not be compensated for time lost while being held out of service prior to the time examination is approved and you pass the other requirements.

Yours truly,

(S.) E. C. SHEFFIELD

cc: Messrs: S. Hammer
C. M. Sublett
A. F. Judd
C. A. Rockwell

United States of America
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

Bureau of Retirement Claims

August 19, 1952

Mr. George C. Moore
Post Office Box 264
Kingsville, Texas

In reply to R. R. B. No. A-338174

Dear Sir:

On July 25, 1952 we replied to your letter of July 12, 1952 in which you inquired why you were being examined by the Board and you requested to be informed concerning the findings of the doctors conducting the examination.

Our records show that you were awarded an annuity principally upon the basis of arthritis and that the annuity has been continued uninterrupted since the award was approved in your favor. The report received from the Veterans Administration Hospital which covers a series of specialized examinations shows substantially the same disability which was present at the time your claim for a disability annuity was approved. The x-ray showed a curvature of the cervical spine, a distinct lipping on the lower cervical vertebrae, a slight lipping on the lower dorsal vertebrae and calcification in the lower dorsal interspaces. Upon the basis of these x-ray studies, a diagnosis of arthritis of the spine was confirmed and continued in effect. Under this decision no change is indicated in the disability status of your claim insofar as your right, to receive a disability annuity is concerned. As previously stated, the Board has

no jurisdiction over the question of whether the employer returns you to work in your regular occupation.

Very truly yours,

(S.) A. R. WELLS
(A. R. Wells)
Director of Retirement Claims

MEMORANDUM OPINION.

Filed April 29, 1953.

(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, For Plaintiff.

Kleberg, Mobley, Lockett & Weil, *Medical-Professional Bldg.*, Corpus Christi, Texas, for Defendant.

Memorandum.

Plaintiff, a resident citizen of Texas, brings this action against defendant, a resident citizen of Missouri. The complaint is in five counts, which really amount to alternative pleadings. Plaintiff alleges:

That he was an employee of defendant under a contract of employment of which the laws of the United States are part, particularly Title 45, Chapters 8 and 9; that on or about October 1, 1924, the railroad entered into a contract with its conductors, represented by the Order of Railway Conductors of America, governing terms and conditions of conductors then in service or who might enter defendant's service, a copy being attached as Exhibit A; that plaintiff entered defendant's employ under such contract about November 1, 1929.

About August 1949, on the advice of his private physician, with defendant's acquiescence, and without resigning or being discharged, plaintiff laid off to follow a regimen recommended by his physician; that about February 15, 1951, having recovered and being in good health for a man of his age, plaintiff presented himself to defendant for resumption of his duties; that defendant, contrary to the contract, refused and still refuses to permit plaintiff to resume and perform his duties; that defendant wrongfully demanded that plaintiff submit to a medical examination by defendant's physician, which requirement was in violation of the contract in which it was stipulated that proper performance of duties would be considered a satisfactory test of physical ability; that this constituted a wrongful discharge of plaintiff to his damage;

In the alternative, plaintiff submitted to an examination by defendant's chief surgeon about February 20, 1951; that the chief surgeon made a written report to defendant, dated March 2, 1951, wrongfully reporting that plaintiff was not physically capable of performing his work, notwithstanding that plaintiff was in good physical condition and capable of performing his duties; that defendant, relying solely on the chief surgeon's report, refused to permit plaintiff to resume performance of his duties which also constituted a wrongful discharge;

Alternatively, after the report of defendant's surgeon plaintiff had himself examined by several competent physicians and surgeons who reported that he was in good physical condition considering his age; that plaintiff furnished these reports to the defendant and requested a hearing which was refused; that this amounted to a wrongful discharge;

Alternatively, about March 6, 1951, when plaintiff received a copy of the chief surgeon's report, he had himself examined by other doctors, including specialists, and again requested a hearing; that this request was granted about May 12, 1951, when plaintiff furnished the reports of his physicians to the defendant and requested that he be given an opportunity to demonstrate his ability to perform his duties; that about August 30, 1951, the defendant refused such request, which amounted to a wrongful discharge;

Alternatively, that after August 30, 1951, plaintiff had other medical examinations made; that about May 1, 1952, he presented all data and information with reference to such examinations to defendant and requested that he be permitted to resume performance of his duties; that about May 29, 1952, defendant attempted to impose conditions upon plaintiff in violation of the contract, among others, that plaintiff agree to waive compensation for the time he had lost by being refused employment theretofore; that this amounted to wrongful discharge;

That plaintiff's physical condition on February 15, 1951, when he originally requested re-employment, was substantially the same as on all other subsequent occasions; that at that time plaintiff had a life expectancy of fourteen (14) years, at least eight of which he would have continued in active duty and the remainder in retirement with benefits; that he had accumulated 22 years seniority and would have acquired 8 more, or a total of 30 years; that his average monthly pay was and would have continued to be $700.00 a month;

Plaintiff sues for $92,600.00 actual damages and $15,000.00 exemplary damages.

Defendant moved for production of documents in connection with plaintiff's application to the U. S. Railroad Retirement Board for disability pension or annuity under the Railroad Retirement Act, setting up that in connection with such application plaintiff made certain statements and representations as to his physical condition and bearing on whether or not plaintiff was defendant's employee at the time of his alleged wrongful discharge.

Plaintiff then filed a motion for production of documents, including various correspondence, allegedly passing between defendant and the Railroad Retirement Board and particularly a copy of a report made by defendant's chief surgeon to the Railroad Retirement Board. Plaintiff opposed defendant's motion for production of documents unless it be conditioned upon defendant's production of the documents plaintiff desires, particularly the report of the chief surgeon to the Board.

Defendant replies that it is willing to produce all of the documents requested by plaintiff excepting the report by the chief surgeon which, defendant claims, it does not have and can not secure; and excepting certain other documents which it has been unable to find after diligent search; and also excepting a demand for production of the record of plaintiff's work time, as requested in Item 15, (since defendant had furnished plaintiff with a full statement of wages paid him);

In connection with plaintiff's demand for production of the chief surgeon's report to the Railroad Retirement Board, plaintiff has attached copies of various letters passing between him and such board with reference to his annuity claim, his request for a copy of the chief surgeon's report and his request that he be given physical examinations by

the board which would disclose that he was physically able to return to his duties. Several of these letters show that the board refused plaintiff's request for a copy of the chief surgeon's report on the ground that "it is for use exclusively in the administration of the Railroad Retirement Board."

Thereafter defendant moved to dismiss because:

Prior to September 29, 1949, plaintiff applied to the Railroad Retirement Board for a disability annuity which was granted, and plaintiff is still drawing monthly payments of such annuity; that it has never been set aside and cannot be collaterally attacked in this action; that plaintiff is estopped, by continued acceptance of the annuity, to contend that he is not disabled and to ask for damages in his action.

While defendant's motion is denominated a motion to dismiss, it is, in reality, a motion for summary judgment, based upon exhibits and plaintiff's deposition.

From the incomplete record before me it appears that:

(1) Prior to May 9, 1947, plaintiff applied to the Railroad Retirement Board for a disability annuity which was denied on or about March 22, 1948, on the ground that he was less than 60 years of age, had less than 20 years service and was not totally and permanently disabled for hire, and did not qualify "under section 2(a) 5 of the Railroad Retirement Act of 1937;"

(2) Thereafter plaintiff applied to defendant for reinstatement and compensation for time lost; his union filed a grievance complaint which resulted in his reinstatement; he resumed his services about June 7, 1948, and continued through August 18, 1949.

(3) Sometime prior to September 29, 1949, plaintiff again applied for, (or renewed his previous application), to the Railroad Retirement Board for a disability annuity; this was granted by the Board on December 16, 1949, (but effective August 19, 1949); plaintiff is still receiving this annuity, in monthly payments; it was awarded "principally upon the basis of arthritis" and a finding that he was disabled for work in his employment;

(4) On August 8, 1951, plaintiff wrote the Board that he was anxious to resume his duties, and believed he was physically able to do so; that on March 2, 1951, defendant's chief surgeon had recommended that plaintiff not resume his duties; that thereafter he had been examined by doctors in Houston, San Antonio and Kingsville whose findings differed from the chief surgeon's; plaintiff, therefore, requested the Board to have him examined to see if he still was entitled to receive his annuity.

(5) On December 26, 1951, the Board advised that, after considering general and specialized examinations, including the one of March 2, 1951, defendant's chief surgeon, they still considered him "permanently disabled for work" in his regular occupation; that the Board had no jurisdiction over employment practices of the railroads and the question of re-employment was purely a matter between plaintiff and his former employer;

(6) Plaintiff wrote Senator Lyndon Johnson who, in turn, took the matter up with the Board; Senator Johnson was advised by the Board on July 3, 1952, that their regulations provided that a recipient of disability annuity report to them if he had recovered; and, that in view of plaintiff's letter to the Senator, the Board was arranging to have specialized examinations made of him to determine if he

had recovered and was "no longer entitled to the annuity benefits which he is now receiving;" at the same time the Board requested plaintiff to report to the Veteran's Administration Regional Office at San Antonio for the examination;

(7) On July 12, 1951, plaintiff wrote the Board that apparently the request for re-examination had been made "by some one other than myself;" that the Board had had plaintiff examined at his own request, in October, 1951, by Dr. A. C. Jones of Kingsville and had advised that his standing would remain unchanged; that he did not object to the examination but would like to know who made the request and for what purposes;

(8) The examination was made at San Antonio and, on August 19, 1952, the Board advised plaintiff as follows:

"Our records show that you were awarded an annuity principally upon the basis of arthritis and that the annuity has been continued uninterrupted since the award was approved in your favor. The report received from the Veterans Administration Hospital which covers a series of specialized examinations shows substantially the same disability which was present at the time your claim for a disability annuity was approved. The x-ray showed a curvature of the cervical spine, a distinct lipping on the lower cervical vertebrae, a slight lipping on the lower dorsal vertebrae and calcification in the lower dorsal interspaces. Upon the basis of these x-ray studies, a diagnosis of arthritis of the spine was confirmed and continued in effect. Under this decision no change is indicated in the disability status of your claim insofar as your right, to receive a disability annuity is concerned. As previously stated, the Board has no jurisdiction over the question of whether the employer returns you to work in your regular occupation."

(9) Plaintiff tried several times to secure a copy of the report to the Board of defendant's chief surgeon as to his findings, but the Board refused to furnish it on the ground that "any report of physical examination, regardless from whom it may have been received, is for use exclusively in the administration of the Railroad Retirement Act."

Plaintiff was granted his annuity in 1949 under the provisions of 45 U.S.C.A. 228b(a) 4(i), upon a finding that his permanent physical or mental condition was such as to be disabling for work in his regular occupation, having completed 20 years of service, Section (a) 4 further provides, in part:

"The Board, with the cooperation of employers and employees shall secure the establishment of standards determining the physical and mental conditions which permanently disqualified employees for work in the several occupations in the railroad industry, and the Board, employers and employees shall cooperate in the promotion of the greatest practicable degree of uniformity in the standards applied by the several employers. *An individual's condition shall be deemed to be disabling for work in his regular occupation if he will have been disqualified by his employer because of disability for service in his regular occupation in accordance with the applicable standards so established . . .* " (Emphasis supplied).

Section (a) 5, provides in part:

"Such satisfactory proof shall be made from time to time as prescribed by the Board, of the disability provided for in paragraph 4 or 5 of this subsection *and of the continuance of such disability (according to the standards applied in the establishment of such disability)* until the employee

attains the age of sixty-five. If the individual fails to comply with the requirements prescribed by the Board as to proof of the *continuance of the disability* until he attains the age of sixty-five years, his right to an annuity shall, except for good cause shown to the Board, cease, but without prejudice to his rights to any subsequent annuity to which he may be entitled. If before attaining the age of sixty-five an employee in receipt of an annuity under paragraph 4 or 5 of this subsection is found by the Board to be no longer disabled as provided in said paragraphs his annuity shall cease upon the last day of the month in which he ceases to be so disabled. An employee, in receipt of such annuity, who earns more than $75. in service for hire, or in self-employment, in each of any six consecutive calendar months, shall be deemed to cease to be so disabled in the last of such six months; and such employee shall report to the Board immediately all such service for hire, or such self-employment. If after cessation of his disability annuity the employee will have acquired additional years of service, such additional years of service may be credited to him with the same effect as if no annuity had previously been awarded to him." (Emphasis supplied).

It is defendant's contention that the Board has jurisdiction, not only to determine the existence of a claimed disability originally, but, once found, whether the disability continues from time to time if it is called in question; that the Board's decisions are not subject to review by other administrative agencies or accounting officers, under 45 U. S. C. A. 228j (b) 1; and can only be reviewed by the Courts, under 228k of Title 45, by a proceeding brought for that purpose, upon a showing that it is clearly and manifestly wrong. There is not doubt that such is the rule in cases where the Board denies an application for an annuity; the

order will stand if supported by substantial evidence and not in violation of law. Gardner v. Railroad Retirement Board, 5th Cir., 148 F. (2d) 935. Watts v. Railroad Retirement Board, 5th Cir., 150 F. (2d) 113; Welborn v. Board, 5th Cir., 151 F. (2d) 448; Squires v. Board, 5th Cir., 151 F. (2d) 182; Wheeler v. Board, 8th Cir., 184 F. (2d) 173; Robinson v. Board, 8th Cir., 184 F. (2d) 703.

Unquestionably, the same rule would apply in an action by an employee where the Board discontinued an annuity upon a finding that the disability no longer existed. But does the statute require such a direct proceeding for judicial review where the Board has found that the disability still exists? As shown by the emphasized portions of the statute quoted above, the Board has power to require satisfactory proof from time to time of the continuance of the disability; and, if the beneficiary fails to comply with such requirement, or if the Board finds that he is no longer disabled, his annuity ceases. Subsection 228i authorizes recovery and adjustments of annuities erroneously paid; and protects from liability certifying or disbursing officers acting in good faith.

This is an anomalous, indeed a peculiar case. It would be supposed that ordinarily the Board would accept an annuity recipient's claim that he had recovered and stop paying him an award he says he does not want. All the reported cases are complaints that the Board has wrongfully denied an annuity to a claimant, not that it had continued one he no longer is entitled to.[1] An additional oddity is the fact

[1] Utah Copper Co. v. Railroad Retirement Board (D.C.) 41 Fed. Supp. 763, aff. 10th Cir., 113 F. (2d) 358; Railroad Board v. Daiquesne Co., 326 U.S. 446, and Dispatch Shops v. Railroad Retirement Board, 2nd Cir., 154 F. (2d) 417, were actions by employers to set aside Board holdings that they were employers under the act.

that here the employee continues to accept his annuity although he says he is not entitled to, and does not want, it.

As pointed out, the statute grants to the Board jurisdiction and broad power to determine disability originally and, from time to time, whether it still exists. 45 U. S. C. A. 288j, (b) 1 provides that the Board "shall have and exercise all the duties and powers necessary to administer sections 228a-228r." Subsection 228k provides that decisions of the Board determining the rights and liabilities of any person [2] under sections 228a to 228c-1 "shall be subject to judicial review in the same manner," etc., as under chapter 11 (of the Railroad Retirement Act, 45 U. S. C. A. 355f) by filing a petition for review against the Board, in the district Court where the claimant resides, within one year. And, as held in the cases, the Board's decision can only be set aside where not supported by substantial evidence and in violation of law.

Notwithstanding the broad language of the statute, I doubt that Congress contemplated that there ever would be an appeal by an annuity beneficiary for judicial review of an order awarding him a continuance of his annuity on the ground that his disability had ceased. Among other reasons for this view, in addition to the anomaly of the situation itself, are the following: (1) the provisions for recovery or adjustment of annuities erroneously paid; (2) the fact that subsection 228k provides that proceedings for review of a decision with respect to an annuity must be

[2] Under this, I suppose, defendant could have petitioned for a judicial review of the continuance of this annuity, since "person" is defined in subsection 228n to include a corporation; and in old subsection 228k, a part of the Act of 1937, the right to Court relief was accorded to "any employee or other person aggrieved."

commenced within one year after the decision is entered upon the Board's records and communicated to the claimant; and (3) the provisions of subsection 228b(b), reading as follows:

"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; *but this requirement shall not apply to the individual mentioned in subdivision 4 and subdivision 5 of subsection (a) prior to attaining age sixty-five.*" (Emphasis supplied).

Plaintiff, coming within the foregoing emphasized exception, says that the effect of the Board's refusal to find that he has recovered and to discontinue his annuity is to compel him to relinquish his right to return to his employment. The Board disclaims jurisdiction of the question of re-employment saying in its letters, that this is a matter between plaintiff and defendant. Nevertheless, the fact remains that plaintiff invoked the Board's jurisdiction originally, reinvoked it on the question of his recovery and continues to accept the benefits of an award, based upon a finding that he is, and has been since 1946, disabled for work in the very employment he says he is now able to resume. The Board made its findings over plaintiff's protests, just as it made findings that certain companies were employers in the cases cited in footnote 1, supra. Plaintiff's whole argument here that the Board acted arbitrarily and in violation of law; that its decision was the result of collusion with, or procurement of, defendant.

Plaintiff had the right to make those contentions and have them decided in a direct proceeding for review brought under subsection 355f. But the finding, upon which the

annuity is based, is not res judicata which does not apply to administrative decisions. 50 C. J. 3. 29, sec. 606. So the situation is not unlike one where a claim for total permanent incapacity is made under the Workmen's Compensation laws and it is shown that the claimant had been found to be so incapacitated in a previous action. It is a question of fact whether he had recovered from the previous condition.

Defendant's plea of estoppel is based upon the foregoing and the fact that plaintiff has continued to collect his annuities. Ordinarily, of course, in order to create an estoppel, the party invoking the doctrine must have acted or been misled to his prejudice; but estoppel frequently is based upon acceptance or retention of benefits, a branch of the rule against inconsistent positions, referable to the principle of election rather than to that of equitable estoppel. 19 Am. Jr. 682. At this time the record is not sufficiently developed for me to say that plaintiff is so estopped.

The appellate Courts repeatedly have cautioned trial Courts to carry motions for summary judgment along with the case until all the evidence is in, especially in close cases, such as this one. I shall do that here.

Defendant's motion for summary judgment, therefore, is overruled and will be carried along with the case.

As indicated upon pre-trial, both motions for production of documents are granted as to all documents the parties are able to secure; excepting that defendant will not be required to produce the record of plaintiff's work time, as requested in item 15.

The Clerk will notify counsel.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas.
April 29, 1953.

MEMORANDUM OPINION

Filed November 19, 1953.

(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, For Plaintiff.

Kleberg, Mobley, Lockett & Weil, Jones Bldg., Corpus Christi, Texas, For Defendant.

Memorandum.

Action by plaintiff for wrongful discharge. Reference is here made to a memorandum dated April 29, 1953, overuling defendant's motion for summary judgment based upon plaintiff's failure to file a direct proceeding for a judicial review of a decision of the United States Railroad Retirement Board.

Defendant has filed a second motion to dismiss based upon plaintiff's failure to allege exhaustion of his remedies under the employment contract between the railroad and plaintiff's union. Article 21 of such contract provides that conductors shall not be unjustly discharged or disciplined; that in case a conductor believes he has been unjustly discharged or disciplined, he shall have the right within ten days to make complaint in writing, and, upon request, be granted a hearing within ten days; that if dissatisfied with the decision he may appeal to "higher authority."

Defendant bases his motion upon a recent decision of the U. S. Supreme Court in Transcontinental & Western Air, Inc. v. Koppal, 346 U.S. 653, 73 S. Ct. 907, 97 L. Ed. 863, in which the Court amplifies Moore v. Illinois Cen-

tral R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089; and holding that, if the applicable State law requires an employee to exhaust his administrative remedies under his employment contract before instituting Court action, he must show that he has done so Defendenat points to the Texas rule announced in the cases[1] requiring a discharged or dissatisfied employee to exhaust his remedies, if required by the contract, before resorting to the Courts.

Defendant frankly concedes that a later decision by the Texas Supreme Court, Texas & New Orleans R. Co. v. McCombs, 143 Tex. 257, 183 S.W. (2d) 716, seemingly changes the Texas rule in railway employee, cases; but pointing to the fact that the McCombs decision was prior to the Supreme Court decision in the Koppal case, and that the Texas Supreme Court did not discuss the general rule in Texas, defendant insists that the Texas Supreme Court apparently decided McCombs on the theory that Moore v. Illinois Central announced the law to be applied to railroad employment cases regardless of the local law.

It is true that the Texas Supreme Court decided the McCombs case in the light of the Moore case and "for the sake of uniformity of decision;" and stated that it "should follow the Moore case rather than the decisions of the Courts of Civil Appeals." The Texas Supreme Court expressly refers to Wyatt v. Kansas City So. Ry. Co., supra and "similar decisions."

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[1] Among others, Wyatt v. Kansas City Southern R. Co. (Tex. Civ. App.) 101 S.W. (2d) 1082; Swilley v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.), 96 S.W. (2d) 105; Cousins v. Pullman Co., 72 S.W. (2d) 356; Matlock v. Gulf C. & S. F. Ry. Co. (Tex. Civ. App.) 99 S.W. (2d) 1056; St. Louis, B. & M. Ry. Co. v. Booker (Tex. Civ. App.), 5 S.W. (2d) 856. See also 7 Tex. Jur., Ten Year Supp. 195, sec. 114a.

Regardless of the basis of the McCombs decision, it remains the local law, announced by the highest Court in this State in railroad employee cases. The employment agreement in the McCombs case contained stronger language and more specific details as to procedure for seeking relief than the one here involved. The Texas Supreme Court held that while the McCombs agreement gave him the right to appeal to the highest company offials, it did not require him to do so; and that there was nothing in that agreement that required the employee to seek administrative relief as a condition precedent to Court action. While that case dealt with a claim for overtime, there is no distinction in principle from a like provision dealing with unlawful discharge.

After the filing of briefs on the second motion to dismiss, defendant's counsel concedes by letter that the contract here involved does not set up the administrative procedure for appeals but contends that it has been built up by custom. In support of this contention counsel has furnished the Court with a copy of an award and opinion by "Special Board of Adjustment No. 24, Missouri Pacific Lines in Texas and La., vs. BLF & E, ORC and BRT, Docket No. 101, Case No. 116, 915-5," involving a claim by the estate of Conductor M. C. Barnes, an employee of defendant, for time lost after he had reported back for duty and before his application for annuity retirement had been granted by the Railroad Retirement Board. The Special Board of Adjustment was composed of a chairman, a representative of the employee and a representative of the employer. This falls far short, however, of establishing an agreement generally as to compulsory submission of such claims to a Board of Adjustment. At most, it merely shows

a voluntary submission of the Barnes claim by the parties in the nature of arbitration.[2]

Defendant's second motion to dismiss, therefore, is overruled. The Clerk will notify counsel.

The action will stand for trial on the following issues: (1) was plaintiff physically able to perform his duties at the time he sought to return; (2) Did defendant arbitrarily refuse to permit him to return to work; and (3) If so, the amount of damages. Defendant's first motion to dismiss will be carried along with the case.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas,
November 19, 1953.

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[2] The decision, however, is interesting and probably decisive here of one disputed question raised by plaintiff's pleading, quoted in the original memorandum, this "proper performance of duty would be considered a satisfactory test of physical ability" to do so. Barnes had applied for and was granted a leave of absence because of his health. Thereafter, and before expiration of his leave, Barnes reported back for duty. Defendant's superintendent referred him to the Chief Surgeon for physical examination. He was examined by a physician at the request of the Chief Surgeon, who found that, unless Barnes improved considerably in the future, he should not be put back to work. Defendant's superintendent refused to permit Barnes to return to work until he reported to the Chief Surgeon for physical examination and received his okay. Barnes failed to do this.

Later he made application to the Railroad Retirement Board for retirement. This was granted. Meantime, however, he had filed claim for time lost between the date he reported back for service and the effective date of his retirement annuity. The Special Board, after reviewing all the facts, denied the claim, holding that where the evidence showed serious doubt as to a conductor's physical capacity to satisfactorily perform his duties, the carrier's request for physical examination by the Chief Surgeon was not unreasonable.

That decision also disposes of the contention pleaded and vigorously asserted by plaintiff in his original brief, i.e., that a pro-

MEMORANDUM OPINION.

Filed April 6, 1954.

(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, For Plaintiff.

Kleberg, Mobley, Lockett & Weil, Jones Bldg., Corpus Christi, Texas, For Defendant.

Memorandum.

Action by plaintiff for damages for discharge from employment. Reference is here made to a memorandum dated April 29, 1953, overruling defendant's motion for summary judgment because plaintff did not file a direct proceeding for judicial review of the decision of United States Rail Retirement Board finding that he was still unable to work; and to a memorandum of November 19, 1953, overruling a second motion to dismiss because of plaintiff's failure to

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vision appearing in an agreement between the I. & G. N. Railroad Co. and its employees has become a part of the agreement with St. L. & B. & M. employees. The provision was: "The proper performance of their duties will be considered satisfactorily test of physical ability of all employees now in service." The decision of the Special Board of Adjustment expressly find that this provision does not apply to defendant's employees; that: "That rule is not contained in the agreement covering working conditions of conductors on the St. Louis, Brownsville and Mexico, the railroad here involved. A review of St. L. B. & M. agreement will confirm this fact. The I. G. N. and the St. L. B. & M. agreements are two separate and distinct agreements, covering two separate properties insofar as rules governing the working conditions of employees in train and engine service is concerned."

On brief and upon pre-trial plaintiff's counsel condeded that the written agreement, attached to his complaint, did not contain the quoted provision; but, insisted, as did Barnes' estate before the Special Board, that it had been incorporated in a 1947 conference in Houston, "with an understanding in regard to servicemen returning from the government service." In any event, plaintiff does not claim to be a returning serviceman.

allege that he had exhausted his remedies under an employment contract between the railroad and plaintiff's union.

Plaintiff had alleged, by alternative counts, that he was physically able to perform his duties as a conductor on or about (a) February 20, 1954; (b) March 6, 1951; (c) July 30, 1951; (d) May 29, 1952; but that defendant arbitrary refused to permit him to resume his duties upon each and all of such dates. A jury found that plaintiff was able to perform his duties on or about May 29, 1952, and that defendant arbitrarily refused to permit him to resume his duties at that time. The jury awarded plaintiff $6,960 for his damages, measured by his probable earnings between May 29, 1952 and the date of trial. The recovery was limited to his probable earnings to the time of trial, under Eubanks v. Galveston, H. & S. A. Ry. Co. (Tex. Comm. App.) 59 S.W. (2d) 825

Plaintiff moves for judgment in excess of the amount awarded by the jury, and, alternatively, for judgment on the verdict Defendant moves for judgment non obstante veredicto based upon (a) the motions to dismiss heretofore urged, overruled and carried along with the case; (b) the fact that, notwithstanding plaintiff's alternative allegations as to his physical ability on the various dates, he had actually applied for re-instatement in February 1951 and had been rejected then; that the subsequent dates were in actually appeals to a higher authority, not new applications to return to work; that there was, in reality, only one application to return to work (that of February 1951) and, since the jury found that plaintiff was not physically able to perform his duties in February 1951, he is not entitled to recover upon a finding that he was able to perform his duties May 29, 1952.

Article 21 of the employment contract provided that conductors should not be unjustly discharged or disciplined; that a conductor who believed that he had been unjustly discharged or disciplined should have the right, within ten days, to make complaint in writing to the railroad and be granted a hearing within another ten days; that, if dissatisfied with the decision, he could appeal to higher authority.

As pointed out in the memorandum of November 19, 1953, this provision for application, appeal, etc. did not set up administrative procedure for appeals. It was silent as to what official of the railroad an application to resume employment should be made, or an appeal taken. The facts here show that neither party concerned themselves with technical details as to procedure; and, while plaintiff in his letter to Sheffield, dated May 1, 1952, referred to his application as an "appeal for reconsideration," yet, after the initial refusal by defendant's chief surgeon Sublett, plaintiff continued to submit to additional medical examinations and furnished additional evidence as to his physical condition to defendant in support of each effort he made to return to work.

Defendant's motions will be overruled and plaintiff's alternative motion for judgment on the verdict is granted. A judgment is being entered in accordance with the verdict. The Clerk will notify counsel.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas,
April 6, 1954.

OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

April 22, 1955

Before HOLMES and RIVES, Circuit Judges, and THOMAS, District Judge.

HOLMES, Circuit Judge: On November 1, 1929, George C. Moore, Sr., appellee, entered the employment of the St. Louis, Brownsville & Mexico Railway Company, of which Guy A. Thompson is Trustee. At the time of his entering such employment, there existed a collective bargaining agreement between said railroad and the Order of Railway Conductors of America, which became part of Moore's contract of employment. Said collective bargaining agreement was a continuing contract for one year after its effective date, and thereafter until 30 days' notice in writing had been given by either party to the other; and said agreement was still in force at the time of the trial of this case.[1] The contract between Moore and the said railway company was made in Texas, was intended to be performed in Texas, and is alleged to have been breached in Texas. No federal question is involved in this controversy as an integral part of the plaintiff's case, though many federal questions are raised in defense thereof. Federal jurisdiction depends solely upon diversity of citizenship between the parties, and the requisite jurisdictional amount.

In January, 1946, appellee was injured on the job, sued appellant, and recovered a judgment against him for dam-

[1] "The Company will furnish a copy of agreement to all Conductors in service. Same is effective October 1st, 1924, and is effective for a period of one (1) year, and thereafter until 30 days' notice in writing has been given by either party to the other, listing changes desired, conferences shall be held immediately upon the expiration of 30 days' notice, unless another date is mutually agreed upon."

ages under the Federal Employers Liability Act. Thereafter, he applied for and was awarded disability payments by the Railroad Retirement Board, and received such payments up to the date of the trial of this case. On February 15, 1951, and at other times, having allegedly recovered from his disability, appellee requested that appellant restore him to active service, which requests, he claimed, were arbitrarily denied; and he brought this suit for damages for his wrongful discharge, which he alleged was accomplished by the railroad's refusal to reinstate him. The plaintiff's cause of action arose under the common law of Texas, and is governed by the law of that state, except to the extent that it may be barred or otherwise affected by federal law.

In *Texas & New Orleans R. Co. v. McCombs*, 143 Tex. 257, 183 S.W. (2) 716, apparently changing the Texas rule in railway employee cases, the Supreme Court of Texas decided that *Moore v. Illinois Central R. Co.*, 312 U.S. 630, announced the local law to be applied in similar cases. The McCombs decision was prior to *T. & W. Air, Inc. v. Koppal*, 345 U.S. 653, 73 S. Ct. 504, 97 L. Ed. 718, in which the court held that, if the applicable state law requires an employee to exhaust his administrative remedies under his employment contract before filing suit, he must show that he has done so. Nevertheless, regardless of the reason for the McCombs decision, it remains the local law, announced by the highest court in the state. On the authority of this decision, the court below overruled the defendant's second motion to dismiss the complaint, and let the action stand for trial on the following issues:

(1) Was the plaintiff physically able to perform his duties at the time he sought to return to work? (2) did the defendant arbitrarily refuse to permit him to return to

work? and (3) the amount of damages that he was entitled to recover.

It is stated in Judge Allred's opinion that, after the filing of briefs on the second motion to dismiss, defendant's counsel conceded that the contract here does not set up the administrative procedure for appeals, but contends that it has been built up by custom. The custom relied on was held by the court below to fall far short of establishing an agreement generally to compulsory submission of such claims to a Board of Adjustment. At most, the court held it merely showed a voluntary submission by the parties of a particular claim.

The court below submitted the case to the jury upon the issues above stated. The verdict rendered in its pertinent part was that the appellee was physically able to perform his duties as conductor on May 29, 1952, and that the appellant's refusal to permit him to resume his duties on or about said date was arbitrary. The jury further found that $6,960 was the amount which would reasonably compensate the plaintiff for loss of employment from May 29, 1952, to the date of the trial, the court having so limited the plaintiff's right to recover future damages in reliance upon *Eubanks v. Galveston, H. & S. A. Ry. Co.*, 59 S.W. (2) 825. The court below awarded judgment for the plaintiff against the defendant for said amount, and both sides appealed to this court from said judgment. The appeal of the plaintiff, George C. Moore, Sr., was from that part of the judgment which denied him recovery of damages, to accrue after the date of the trial, for defendant's breach of contract.

We agree with the court below, and with the contentions of appellee, that the remedial provisions of the Railway

Labor Act did not require appellee to exhaust his administrative remedy before filing an independent suit for his wrongful discharge; that the findings of the Retirement Board were not conclusive where, as here, the claimant exercised his option to pursue his judicial remedy without first exhausting his administrative remedy; and that appellee was not estopped by having received annuity payments from the Board under the facts and circumstances in this case. The jury, by its verdict, having found that appellee was physically able to perform the duties of his employment as conductor for the defendant on May 29, 1952, and that appellant arbitrarily refused to return him to work on said date, and such verdict being supported by substantial evidence, the court correctly rendered judgment upon such verdict, awarding plaintiff damages for wrongful discharge. The trial court also correctly overruled defendant's motion for an instructed verdict.

We find no reversible error in the record, and think that the judgment appealed from should be affirmed on both appeals. It is so ordered. *Moore v. Illinois Central R. Co.*, 312 U.S. 630; *T. & W. Air, Inc. v. Koppal*, 345 U.S. 653; *Tex. & N. O. R. Co. v. McCombs*, 143 Tex. 257, 183 S.W. (2) 716. The two memorandums of Judge Allred in this case have not been published, but they are in the record and will be added in an appendix to this opinion.

AFFIRMED.

(Judge Allred's opinions of April 29, 1953, and of November 19, 1953,—without footnotes, however,—appear here. Since they are reproduced in this appendix with their footnotes, they are omitted at this point.)

AWARD IN CASE OF M. C. BARNES

AWARD NO. 182
DOCKET NO. 101
CASE NO. 951-5

SPECIAL BOARD OF ADJUSTMENT NO. 24
ORDER OF RAILWAY CONDUCTORS

vs.

MISSOURI PACIFIC LINES IN TEXAS AND LOUISIANA

Request that the estate of Conductor M. C. Barnes be allowed pay for all time lost from his run September 17, 1951, to the date of severing his connection with the carrier for the purpose of obtaining his railroad pension.

FINDINGS: The Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Where, as here, there is a perceptible deterioration in physical condition of degree and significance sufficient to throw serious doubt on conductor's physical capacity to satisfactorily perform his duties, a request that he undergo a physical examination by carrier's physician before being

permitted to resume service is not improper.

AWARD

Claim denied.

SPECIAL BOARD OF ADJUSTMENT NO. 24

(S) HAROLD M. GILDEN
Harold M. Gilden, Chairman

(S) T. SHORT
T. Short, Carrier Representative

(S) C. H. BINGHAM
C. H. Bingham, Employe Representative

Houston, Texas
October 16, 1953

AWARD IN CASE OF A. P. BOVIT

FIRST DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD

ORDER OF RAILWAY CONDUCTORS

VS.

THE DELAWARE AND HUDSON RAILROAD CORPORATION

J. Glenn Donaldson, Referee.

FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Article 6, relied on by claimant, applies to work assignments made by carrier. This Division has previously ruled that physical examinations are not "work assigned" within the contemplation of such a rule, hence Article 6 does not support the claim.

The parties have heretofore negotiated a rule concerning color perception, acuteness of vision or hearing (Article 8). The employes protested the unilateral institution of an additional regular, periodic, physical examination, contending that it was a change in working conditions requiring negotiations apparently because it went beyond the negotiated Article 8 which, as we have pointed out, dealt only with certain physical conditions. In effect, the employes contend, that unless provision is made in the rules for physical examinations there is no compulsion upon the employes to submit to them, at least unless they be compensated for time lost in doing so, upon the basis that it constitutes assigned work. The claim raises the broad question of whether or not the institution of such a program is properly within the scope of managerial rights.

Our attention has not been called, nor does our examination of the current rules reveal, any negotiated rule dealing with physical examinations either upon entry into service or upon return from sick or disability leave. Does it follow that the carrier is without right in requiring the same because not negotiated? We think not. We must bear in mind the nature of the services rendered; the general practice prevailing in industry and in particular the transportation industry, and the carrier's strict legal liability to the public for the safe passage of its trains. Continued good sight and

hearing are only a part of the physical attributes which must continuously attach as a condition of employment to those entrusted with the lives and property of the patrons and employer. We find that the institution of a regular, periodic, physical examination program to assure the continued good health of its employes in the interests of the protection of the public and the equipment handled is a managerial function and that the same may be unilaterally imposed. (Awards 7663, 8605). As in the case of all managerial prerogatives however, exercise of the right must be reasonable. Under the circumstances here present, we cannot say the carrier acted unreasonably.

It may be argued that this ruling is in conflict with this Division's ruling in Award No. 8131; however, it should be obvious from a reading of that docket, that the carrier there saw fit to relinquish its authority, in part, and the Division merely construed the agreement as written.

AWARD

Claim denied.

AWARD IN CASE OF W. L. NEDNEIN

THIRD DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD,

AWARD 2210

ORDER OF RAILWAY TELEGRAPHERS

VS.

PENNSYLVANIA RAILROAD

H. Nathan Swain, Referee.

"OPINION OF BOARD: The facts are undisputed. W. L. Nednein, as senior unassigned extra operator, was assigned

to fill a temporary vacancy at "RJ" because of the absence of the regularly assigned operator from July 19 to July 28, 1941. Wednesday, July 23, was the regular relief day assigned to this position pursuant to Rule 4-B-4 of the Agreement. On that day the regular relief operator filled the position and Nednein for that day was assigned to fill a temporary vacancy at office "AD."

"Nednein now claims pay for the day at the rate of time and one-half on the theory that he was required to work on the 'relief day assigned to his position.'

"Nednein, under the same Agreement, presented a claim through the Local Chairman against the same Carrier for pay at the regular rate for certain days lost in the month of September, 1941, because of the failure of the Carrier to assign him, as the senior available extra operator, to temporary vacancies on relief days of the position to which he was then temporarily assigned. The Carrier agreed to the claim and paid him for such relief days.

"That claim on which Nednein was paid was entirely inconsistent with his present claim. If while on a temporary assignment to one position, he was, on the relief days of that position, entitled, as the senior available extra operator, to assignment to other temporary vacancies he could not claim time and one-half for working 'on the relief day assigned to his position.' If on such a temporary assignment the position was *his* position on the relief day, then on that day he could not be the senior unassigned extra operator.

"Without deciding whether the contention of the petitioner in the other claim was sound or whether the contention he is making in this claim is sound, we must hold that

having received the payment demanded on his first claim he is now estopped to present this claim on a theory directly opposed to the theory on which the first claim was predicated, and on which he received money. He cannot be permitted to take the money from the Carrier on the theory that one interpretation of the Agreement is correct and then be sustained on another claim predicated on the opposite interpretation.

"FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

"That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

"That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

"That the petitioner having demanded and accepted payment on a prior claim for relief days on which he did not work, on the theory that he was an extra operator available for assignment on those days, is now estopped from claiming payment at the rate of time and one-half for work on an assignment on a relief day.

"AWARD

"The Claim is denied."

INTERPRETATION OF AWARD 14987
DOCKET 27667

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South LaSalle Street, Chicago 3, Illinois

With Referee Thomas J. Mabry

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS
UNION PACIFIC RAILROAD COMPANY

The award of which an interpretation is requested reads:

> "Claim sustained for full restoration of seniority and vacation rights and pay for all time lost. Such pay for lost time shall be calculated in keeping with past practices in making such calculations on this property."

It was the purpose of the award here in question and the intention of the Board by affording full restoration of seniority and vacation rights and pay for all time lost, to restore his status as an employe and place claimant Kibler in a position to receive all benefits of employment for the period of time he was wrongfully held out of service and until he would be automatically retired by virtue of age. We were, at the time of the rendition of the award, aware of the fact that claimant had made claim for, and was possibly then receiving, retirement benefits from the Railroad

Retirement Board; and, likewise, that he was then at, or fast approaching, the age where retirement from the service of the carrier was compulsory. We were under no misconception as to any of the facts disclosed by the docket then before us or of any facts later discussed by this request for interpretation.

In discussing what would result if an affirmative award were granted and claimant had received prior to such time annuities from the retirement board, it was agreed that he could not be paid from the two sources for the same period, and that he would, in event his claim should be allowed, be required to return to the retirement board any amounts so received during the period not in the service of the carrier and when not paid by the carrier. The award assumed there would be an adjustment of this matter so that claimant would not have the benefit of both sources of payment.

We do not accept the argument of carrier that this Board cannot order restored to service an employe who, after wrongful discharge and in order to protect himself as to his annuity rights at the earliest possible time, has relinquished all rights of seniority with the carrier and thus disengaged himself from the service. We view such relinquishment of rights of an employe as "voluntary" only in that he acted under no compulsion from the carrier, his former employer. But, claimant must have been under another compulsion, that of a clear duty to protect himself under the retirement act until such a time as he might have been restored to his original status and paid for lost time. It was not the purpose of this Division under this award to have required claimant to gamble on the outcome of his claim before us, or on the time that might be required to decide it, and to stand by without any effort

to secure the benefits of retirement which, under the rules, he would be entitled to receive.

A letter in evidence upon this hearing for interpretation, from the Railroad Retirement Board, recognizes that there may be, as there have been, reinstatement of employes who have been drawing such retirement pay and that "in accordance with precedent established in like cases" such situations are met by requiring a refund of the annuities so paid for the time in question. This letter is persuasive of the practice in that respect.

The carrier refers to, and relies upon, Award 11888 and interpretation thereof, with Referee Thaxter sitting with the Board. Without undertaking to set out in citation and reasoning our disagreement with carrier, we say that docket presented a different set of circumstances; and, moreover, it might be said that some parts of the interpretation of that award would rather lend, than withhold, support for our position here.

But, be that as it may, we say that Award 11888, so heavily relied upon by carrier, is wholly unsound if it bears the interpretation so contended for, to the effect that a discharged employe may not, while awaiting a decision of this Division for restoration of rights and for pay, accept benefits from the Railroad Retirement Board except under penalty of forfeiting all rights thereafter to be awarded by this Board. We are not, however, in agreement that that award bears such interpretation as it would apply to the facts in this case.

The award here in question is interpreted to require payment of all lost time up to the date claimant would be retired because of age limit, viz, June 21, 1951. The parties

hereto are in agreement as to other requirements to be met under the award and they need not be noticed further.

NATIONAL RAILROAD ADJUSTMENT BOARD
BY ORDER OF FIRST DIVISION

ATTEST: (Signed) J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 10th day of April, 1952.

EXCERPTS FROM RAILWAY LABOR ACT
45 U.S.C.A. 151, et seq:

Sec. 152. General duties—Duty of carriers and employees to settle disputes

* * * *

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated

upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * * *

Sec. 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

EXCERPTS FROM RAILROAD RETIREMENT ACT 45 U.S.C.A. 228b, et seq:

Sec. 228b. Eligibility for annuities; time of accrual; spouse's annuity

(a) The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall, subject to the conditions set forth in subsections (b)-(d) of this section, be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a(a) of this title (but with the right to engage in other employment to the extent not prohibited by subsection (d) of this section):

* * * *

4. Individuals having a current connection with the railroad industry, and whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (i) will have completed twenty years of service or (ii) will have attained the age of sixty. The Board, with the cooperation of employers and employees, shall secure the establishment of standards determining the physical and mental conditions which permanently disqualify employees for work in the several occupations in the railroad industry, and the Board, employers, and employees shall cooperate in the promotion of the greatest practicable degree of uniformity in the standards applied by the several employers. An individual's condition shall be deemed to be disabling for work in his regular occupation if he will have been disqualified by his employer because of disability for service in his regular occupation in accordance with the applicable standards so established; if the employee will not have been so disqualified by his em-

ployer, the Board shall determine whether his condition is disabling for work in his regular occupation in accordance with the standards generally established; and, if the employee's regular occupation is not one with respect to which standards will have been established, the standards relating to a reasonably comparable occupation shall be used. If there is no such comparable occupation, the Board shall determine whether the employee's condition is disabling for work in his regular occupation by determining whether under the practices generally prevailing in industries in which such occupation exists such condition is a permanent disqualification for work in such occupation. For the purposes of this section, an employee's "regular occupation" shall be deemed to be the occupation in which he will have been engaged in more calandar months than the calendar months in which he will have been engaged in any other occupation during the last preceding five calendar years, whether or not consecutive, in each of which years he will have earned wages or salary, except that, if an employee establishes that during the last fifteen consecutive calendar years he will have been engaged in another occupation in one-half or more of all the months in which he will have earned wages or salary, he may claim such other occupation as his regular occupation; or

5. Individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

Such satisfactory proof shall be made from time to time as prescribed by the Board, of the disability provided for in paragraph 4 or 5 of this subsection and of the continuance of such disability (according to the standards applied in the establishment of such disability) until the employee

attains the age of sixty-five. If the individual fails to comply with the requirements prescribed by the Board as to proof of the continuance of the disability until he attains the age of sixty-five years, his right to an annuity by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights to any subsequent annuity to which he may be entitled. If before attaining the age of sixty-five an employee in receipt of an annuity under paragraph 4 or 5 of this subsection is found by the Board to be no longer disabled as provided in said paragraphs his annuity shall cease upon the last day of the month in which he ceases to be so disabled. An employee, in receipt of such annuity, who earns more than $75 in service for hire, or in self-employment, in each of any six consecutive calendar months, shall be deemed to cease to be so disabled in the last of such six months; and such employee shall report to the Board immediately all such service for hire, or such self-employment. If after cessation of his disability annuity the employee will have acquired additional years of service, such additional years of service may be credited to him with the same effect as if no annuity had previously been awarded to him.

Sec. 228j. Railroad Retirement Board — Establishment; appointment; compensation

* * * *

(b) 1. The Board shall have and exercise all the duties and powers necessary to administer sections 228a to 228c—1 228e—228h, 228i—228p, 228r, and 228s of this title and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such sections and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to pensions, annuities, or

death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

* * * *

Sec. 228k. Court jurisdiction

Decisions of the Board determining the rights or liabilities of any person under sections 228a to 228c—1, 228e—228h, 228i—228p, 228r, and 228s of this title shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under chapter 11 of this title except that the time within which proceedings for the review of a decision with respect to an annuity, pension, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant. Aug. 29, 1935, c. 812, Sec. 11, 49 Stat. 973; June 24, 1937, c. 382, Pt. I, Sec. 1, 50 Stat. 315; July 31, 1946, c. 709, Sec. 215, 60 Stat. 735.

Sec. 355. Claims for benefits—Publication of Board's regulations

* * * *

(f) Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing

a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall certify and file with the court in which such petition has been filed a transcript of the record upon which the findings and decision complained of are based. Upon such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter upon the pleadings and transcript of the record a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional

record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determine that the proceedings for such review have been instituted or continued without reasonable ground.

* * * *

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No. 326

In the

Supreme Court of the United States

October Term, 1955

GUY A. THOMPSON, Trustee, The St. Louis, Brownsville & Mexico Railway Company, Debtor,

Petitioner,

v.

GEORGE C. MOORE, SR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 326

In the

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GUY A. THOMPSON, Trustee, The St. Louis, Brownsville & Mexico Railway Company, Debtor,

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v.

GEORGE C. MOORE, SR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

Being unable to concur with all of the statements in Petitioner's Statement of the Case, and in order that Your Honors may have a correct and full picture of the nature of this case and of the established facts as they relate to

the questions raised by Petitioner, the following Statement of the Case is respectfully submitted:

Respondent entered Petitioner's employ as a railroad conductor on, and held seniority as such from, November 1, 1929, under a collective bargaining contract which became part of his employment contract. (R. 12, 25, 192.) Such contract, which was in force at the time of the trial, is admitted to be a continuing contract. (R. 12.)

In January, 1946, Respondent, then fifty-four years old, was injured in service (R. 115-116), but continued working despite his injury until 1949, when he voluntarily laid off for convalescence (R. 258). During the time he laid off, he drew annuity payments from the Railroad Retirement Board (R. 80).

Having recovered from his injury, on February 15, 1951, he presented himself to Petitioner's Superintendent to return to work under his contract (R. 263). At Petitioner's insistence, he submitted to an examination by Petitioner's surgeon at Kingsville, Dr. C. M. Sublett. Upon presenting himself to Dr. Sublett, the latter, using profanity, angrily informed Respondent that he was not going to pass him for return to work; that Petitioner would not let him go back to work anyway. (R. 269, 270, 271.) Dr. Sublett then made only a most perfunctory examination of Respondent, informing him that he was not going to pass him because of "weakness of hands and shortness of breath," giving no other reasons at the time. (R. 272, 274.)

Respondent immediately had himself examined by other doctors, including the examiner for another railroad, who

found and reported him (in writing) to be in good health and sound physical condition. (R. 276, 278, 296, 298.) Respondent again reported to the Superintendent and presented such medical reports to him, renewing his request to return to work, but the Superintendent refused even to look at them (R. 282-284), stating in substance that the matter was closed (R. 293).

Over a period of approximately two years, Respondent undertook to obtain Petitioner's permission to return to work, having himself examined by various highly reputable doctors, including specialists and including examiners for other railroads, procuring written reports of his examinations by them, all of which showed him to be in good health and sound physical condition, all of which reports were tendered to Petitioner. (R. 97, 330, 429-434, 451, 462-463, 557, 569, 743-745, 765, 767.) But Petitioner steadfastly refused to permit him to return to work.

During the period when Respondent was trying to obtain permission to return to work, Petitioner first assigned as the reason for refusal, Dr. Sublett's "examination" of Respondent. However, after Respondent was examined by other doctors and tendered to Petitioner the reports of such examinations showing him to be in good health and sound physical condition, Petitioner then assigned as an additional reason for denying Respondent return to work, the fact that Respondent was receiving annuities from the Railroad Retirement Board. Thereupon, Respondent redoubled his efforts to get the Railroad Retirement Board to discontinue such payments, so that they would not inter-

fere with his return to work (R. 90-93, 95, 307-308), including trips to such Board's offices in Chicago; but he was assured by the Railroad Retirement Board that his payments should not stop until he had returned to work and thus his receipt of such would not prejudice his right to return to work. (R. 92-93, 95.) Despite his efforts to have such annuities stopped, the Railroad Retirement Board continued to send them to him; and this, despite the fact that in October, 1951, an examination of Respondent by a doctor at the request of the Railroad Retirement Board failed to reveal any evidence of continuing disability (R. 330, 743-745), resulting in a letter from the Railroad Retirement Board to the Petitioner, requesting that Petitioner call Respondent for further examination with a view to returning him to work. (R. 830, 831.) Such request was never complied with.

On December 3, 1951, Petitioner's Assistant Secretary forwarded such request to Dr. C. M. Sublett at Kingsville, Texas, with his own letter of transmittal, instructing Dr. Sublett to handle and reply to such request by the Railroad Retirement Board "in accordance with our conversation of June 14, 1950." (R. 834.) The "conversation of June 14, 1950," referred to, occurred almost a year before Respondent first sought to return to work on February 15, 1951. By letter dated December 10, 1951, Dr. Sublett replied to the Railroad Retirement Board, stating he had *reviewed* Respondent's record and that, in view of such material in the file, he would not re-instate Respondent as a conductor, sending a copy of such letter to Petitioner's Assistant Sec-

retary and a copy to the Superintendent. (R. 835, 836.) Dr. Sublett did not re-examine Petitioner as requested by the Board, and in fact, did not even communicate with him about it. (R. 838, 839.)

After nearly two years of earnestly and sincerely trying to convince his employer that he was physically able to perform the duties of his employment so that he might work to earn his livelihood, and reflecting upon the reasons given for refusing him that right, as well as the apparent and implicit activities of the Company to influence the Railroad Retirement Board with regard to the continued sending of annuity payments to him, Respondent finally concluded that the statement made to him by Dr. Sublett (Petitioner's surgeon at Kingsville, Texas), in February, 1951, to the effect that regardless of Respondent's physical condition, he would not be permitted to work on the railroad, was correct; that the Company (Petitioner) intended not to permit him to resume his work at his employment, regardless of his physical ability. Thereupon, prior to February, 1953, he filed this action for damages for wrongful discharge. (R. 11.)

Respondent was present before the trial court for five days, during which time the Trial Judge and the jury had full opportunity to observe him, his physical appearance and his manner of conduct, as well as to hear his testimony. (R. 3, 4, 239-427, 1021.)

Trial was to a jury beginning on January 25, 1954 (R. 3, 220), at the conclusion of which the jury's verdict on Special Issues was received, accepted and filed on January

29, 1954. (R. 217-219.) Respondent duly filed and presented Alternative Motions for Judgment (R. 1060), and on April 12, 1954, the Court rendered his Corrected Judgment for Respondent against Petitioner for the sum of $6,960, being the damages which the jury found Respondent had sustained to the date of trial. (R. 217-219, 1082.) Appeal and cross-appeal were duly taken to the United States Court of Appeals for the Fifth Circuit, at New Orleans (R. 1109, 1110), where the judgment was affirmed (please see page 57 of Petitioner's Petition for Writ of Certiorari).

INACCURACIES IN PETITION FOR WRIT OF CERTIORARI

Petitioner makes several inaccurate statements in his Petition, which Respondent is constrained to specifically point out:

(1) On pages 5, 23 and 27 of such Petition for Writ of Certiorari, Petitioner states that Sheffield, in his letter of May 29, 1952, addressed to Respondent, informed Respondent that if Petitioner's doctor advised that Respondent was physically fit, it would be satisfactory for him to return to work "*if he passed the safety rules examination.*" As will be readily seen by inspection of the letter referred to (R. 321 and also Petition for Writ of Certiorari, Appendix, p. 34), such statement is incorrect. Nowhere in that letter are the words "safety rules examination" found.

Such communication required that Respondent "*pass the other requirements*," without limitation or specification, and especially without limiting such requirements to "safety rules examination."

(2) On page 17, Petitioner says that the written agreement (meaning the Collective Bargaining Contract involved) contained no provision for submitting the question of Respondent's physical ability to a board of three doctors, and then adds the statement "*but plaintiff took the position that by custom it had become a part of the agreement.*" Such added statement is without support in the record and has no foundation in fact.

(3) On page 7 of said Petition (in Statement of the Case) and again on page 23 (in Argument), Petitioner says that the jury found that Respondent was disabled at the time that he applied to the Superintendent on all pertinent dates prior to May 29, 1952. The jury did not so find. The Court charged the jury (R. 1035) that plaintiff has the burden to "establish affirmative answers to the Special Issues * * * by a preponderance of the evidence." The only effect of the jury's negative answers as to dates prior to May 29, 1952, was that plaintiff failed to meet that burden to the jury's satisfaction. This is elementary.

QUESTIONS PRESENTED BY PETITION FOR WRIT OF CERTIORARI

Petitioner's Petition for Writ of Certiorari and his brief in support thereof present only four questions, although

some are presented in various shades. Such four questions are:

1. Does the Railway Labor Act abrogate a discharged railroad employee of his common law remedy of an action for damages for wrongful discharge?

2. Under the law in Texas, is a wrongfully discharged railroad employee required to pursue available administrative remedies as a prerequisite to an action in court for damages for wrongful discharge?

3. Does the receipt by Respondent of annuity benefits from the Railroad Retirement Board, under the facts in this case, deprive Respondent of redress for his wrongful discharge?

4. Was Respondent wrongfully discharged by Petitioner?

RESPONDENT'S PROPOSITIONS

I.

The Railway Labor Acts does not deprive the courts of jurisdiction of actions by railroad employees for damages for wrongful discharge.

II.

The law in Texas does not require Respondent to exhaust administrative remedies as a prerequisite to action in court for recovery of damages for wrongful discharge.

III.

Receipt by Respondent of annuity benefits from the Railroad Retirement Board during the time Petitioner

arbitrarily kept him from working does not preclude Respondent from recovering his damages for wrongful discharge.

IV.

The record containing substantial evidence (if not conclusive) to support the jury's finding of wrongful discharge of Respondent by Petitioner, such finding is binding upon the Supreme Court.

PROPOSITIONS RESTATED

I.

The Railway Labor Acts does not deprive the courts of jurisdiction of actions by railroad employees for damages for wrongful discharge.

ARGUMENT

Petitioner's contention that the Railway Labor Act, U. S. C. A. Title 45, deprives the courts of jurisdiction of actions for damages for wrongful discharge, and deprives employees of such remedy, is untenable.

Prior to the enactment of the Railway Labor Act, there existed, at least under Texas law, no remedy by way of specific performance of a contract for personal service. *Consolidated Indemnity Insurance Co. v. Smith (Tex. Civ. App.), 74 S. W. 2d 139; Kennon v. Schlesinger (Tex. Civ. App.), 182 S. W. 2d 373, error refused.*

Enactment of the Railway Labor Act created such specific performance remedy, and established the National Railroad Adjustment Board to administer it. *U. S. C. A. Title 45, Ch. 8, Sec. 153.* That Board has exclusive jurisdiction of a complaint of a wrongfully discharged railroad employee who has elected to stand on his contract and seeks restoration to duty with full seniority and back pay. *Butler v. Thompson (C. A. Mo., 1951), 192 Fed. 2d 831; Buster v. Chi. M. St. P. & P. Ry. Co. (C. A. Ill., 1952), 195 Fed. 2d 73.* The National Railroad Adjustment Board has no jurisdiction to entertain an action for, or to award a recovery of damages for wrongful discharge.

But the creation of such new remedy in the industry and the establishment of the National Railroad Adjustment Board to administer it, did not abrogate nor impair the common law remedy of action for damages for wrongful discharge; nor did it divest the courts of jurisdiction to entertain such actions. Since the enactment of the Railway Labor Act, a wrongfully discharged railroad employee has an election of remedies. He may stand on his contract and take his grievance to the Railroad Adjustment Board for relief by way of restoration to duty, with full seniority unimpaired and for wages for time lost; or, he may elect to stand on breach and bring his action in court for damages for the wrongful discharge. *Moore v. Ill. Cent. R. Co., 61 S. Ct. 754, 312 U. S. 630, 85 L. Ed. 1089; Michel v. Louisville & N. R. Co. (1951), 188 Fed. 2d 224; Priest v. Chi. R. I. & P. RR. Co. (C. A. Ark., 1951), 189 Fed. 2d 813; Newman v. Balt. & O. R. Co. (C. A. Pa., 1951),*

191 Fed. 2d 560; Oswald v. Chi. B. & Q. Ry. Co. (C. A. Ia., 1952), 200 Fed. 2d 549; Watson v. M. K. & T. Ry. Co. (Tex. Civ. App.), 173 S. W. 2d 357 (no Writ of Error history); Kendall v. Penn. R. Co. (D. C. Ohio, 1950), 94 Fed. Supp. 875; Swartz v. Sou. Buffalo Ry. Co. (D. C. N. Y., 1942), 44 Fed. Supp. 447; Youmans v. Charleston & W. Ry. Co. (S. Car.), 178 S. E. 671.

Therefore, Respondent properly brought this action in court, and the Trial Court correctly assumed jurisdiction thereof.

II.

The law in Texas does not require Respondent to exhaust administrative remedies as a prerequisite to action in court for recovery of damages for wrongful discharge.

ARGUMENT

The Supreme Court of the State of Texas has settled the law in Texas upon this point in the case of *Texas & New Orleans Railroad Co. v. McCombs, 143 Tex. 237, 183 S. W. 2d 716*, in which case that court holds that not only is the employee not required to exhaust administrative remedies, but that he is not required to resort to any such available remedies. Petitioner cites a number of opinions by some of the Texas Courts of Civil Appeals, none of which are in point upon the facts involved, and none of which have the effect of changing the rule as laid down by the Texas Supreme Court.

III.

Receipt by Respondent of annuity benefits from the Railroad Retirement Board during the time Petitioner arbitrarily kept him from working does not preclude Respondent from recovering his damages for wrongful discharge.

ARGUMENT

Petitioner cites authorities to the effect that an employee cannot claim wages for a period during which he drew pay for services in another assignment. Such cases are not in point. Respondent has not sued for nor recovered wages. This suit is for damages for wrongful discharge.

The record contains considerable undisputed evidence of Respondent's efforts to get the Railroad Retirement Board to stop sending him annuity payments as soon as he learned that Petitioner assigned that as an additional reason for denying him the right to return to work. Among other things, he made two trips to the Board's regional office at Dallas, Texas, and two trips to the main offices at Chicago, Illinois (R. 82, 90-96), on each of which occasions he requested that the payments be stopped so that it would not interfere with his return to work. (R. 83, 90, 92, 96.) He was assured by the Board that he was entitled to the payments until he should return to work; that the Board has means to recover erroneous payments. (R. 92, 93.) Correspondence with the Board resulted in his examination by Dr. A. C. Jones in November, 1951, at the Board's request. (R. 743, 744.) Dr. Jones found and reported Re-

spondent to be in good health and good physical condition. (R. 330, 754.) Thereupon, by letter dated November 28, 1951, the Retirement Board informed Petitioner that its examination of Respondent disclosed no continuing disability, and requested that Petitioner call him for re-examination with a view to returning him to work. (R. 830, 831.) Petitioner's Assistant Secretary of the railroad forwarded the Board's letter and request to Dr. C. M. Sublett at Kingsville, Texas, with instructions to handle it "in accordance with our conversation of June 14, 1950." In pursuance of that instruction, Dr. Sublett neglected to call Respondent for re-examination, did not examine him, and replied to the Retirement Board that upon *review of Respondent's record*, he declined to return him to work. (R. 835, 836.)

Considerable pre-trial proceedings were had, and this feature of the case was thoroughly developed (R. 37-57, 58-63, 64-75) and the Trial Court properly found that Respondent had done all that was required of him to have such annuity payments stopped, if such were necessary to protect his right to return to work under his employment contract. (R. 128-141, 422.)

But it was not necessary that such payment be stopped before Respondent returned to work. He was receiving such payments under U. S. C. A. Title 45, Ch. 9, Section 228b(a) par. 4(ii). (R. 322.) That section of the Retirement Act further provides:

> "If before attaining the age of sixty-five an employee in receipt of an annuity under paragraph 4 or

> 5 of this subsection is found by the Board to be no longer disabled as provided in said paragraphs *his annuity shall cease upon the last day of the month in which he ceases to be so disabled.*" (Emphasis added.)

Thus it is seen that an employee must return to work before his annuity payments stop; and that it is legally proper for an employee to receive and keep disability annuity for the same period during which he may draw pay for work after returning to work from disability lay-off.

Respondent was under sixty-five years of age at the time of trial. (R. 241, 242.)

Therefore, when Petitioner sought to impose upon Respondent the requirement that he cease receiving remittances from the Retirement Board as a prerequisite to permission to return to work, Petitioner undertook to deprive Respondent of what he was legally entitled to receive, which action in itself was arbitrary.

Attention is invited to the provisions of Section 228i(a) of Title 45, U. S. C. A., which provides for recovery by the Railroad Retirement Board of payment erroneously made; and also Section 228i(c) of the same title, which provides that there shall be no such recovery of erroneous payments when made, in the judgment of the Board, without fault upon the part of the recipient, or when recovery would be against equity or good conscience.

It is submitted, therefore, that the receipt by Respondent of annuity payments does not preclude his recovery of his

damages for wrongful discharge; and that the Trial Court and the Court of Appeals correctly so held.

IV.

The record containing substantial evidence (if not conclusive) to support the jury's finding of wrongful discharge of Respondent by Petitioner, such finding is binding upon the Supreme Court.

ARGUMENT

Trial to the jury began on January 25, 1954 (R. 220), and the introduction of evidence was completed on January 28, 1954 (R. 1024). The bulk of the testimony given during those four days consisted of the overwhelming medical evidence showing Respondent's physical ability to perform the duties of his employment (R. 330, 429, 464, 514, 544, 558, 568, 594), being the testimony of various medical experts concerning their examinations of Respondent, showing him to be physically able to perform his work; as against the perfunctory examination of him by Dr. Sublett upon which the latter turned Respondent down. (R. 272-274.) Dr. Sublett, using profanity, informed Respondent that Petitioner would not permit him to return to work regardless of his physical condition. (R. 269, 270.) Dr. Sublett, although a witness, did not deny such testimony.

The proof further shows that Respondent proposed that he be examined by a doctor or doctors (other than Sublett) of Petitioner's choice, at Respondent's expense, and that the parties abide by their findings as to his physical ability to perform the duties of his employment. (R. 316.) This

offer was declined, although B. W. Proctor, Petitioner's Assistant Chief of Personnel, wrote a letter to Assistant General Manager Sheffield saying he thought such would be a fair procedure. (R. 1014.) Sheffield, who had the authority to accept or reject such proposal, rejected it, imposing new and additional requirements. (R. 321-322.) The jury thought these were arbitrary.

Attention is again invited to the correspondence between the Railroad Retirement Board, C. A. Rockwell, Petitioner's Assistant Secretary, and Dr. C. M. Sublett, with reference to the Retirement Board's request for a re-examination of Respondent in November, 1951, and the manner in which such request was handled "in accordance with our conversation of June 14, 1950." (R. 830, 831, 834-836, 838-839.)

Petitioner does not say—he can not say that there is not substantial evidence to support the jury's verdict. The evidence is overwhelmingly in support of the verdict. What Petitioner says, in effect, is that the jury has misconstrued the evidence.

Whether or not there was a wrongful discharge is a fact question. The jury, on substantial evidence, has found there was a wrongful discharge; and that finding is binding upon this Honorable Court. *U. S. v. Johnson, 66 S. Ct. 464, 327 U. S. 106, 90 L. Ed. 414, reh. den. 66 S. Ct. 699, 327 U. S. 817, 90 L. Ed. 1040; Loews, Inc. v. Cinema Amusements Co., Inc., 210 Fed. 2d 86, Cert. Den. 74 S. Ct. 787, 347 U. S. 976, 98 L. Ed. ....*

CONCLUSION

In conclusion, Respondent submits that Petitioner's Petition for Writ of Certiorari presents no maintainable ground for the issuance of the Writ; wherefore, such Petition for Writ of Certiorari should be in all things denied; and Respondent respectfully so prays.

Respectfully submitted,

David H. Nutt

DAVID H. NUTT,
1424 K. Street, N. W.,
Washington 5, D. C.,
Attorney for Respondent.

Of Counsel:
J. MARVIN ERICSON,
Corpus Christi, Texas.

I hereby certify that a copy of this Brief has been mailed to opposing Counsel of Record with proper address and sufficient postage, this 7th day of September, 1954.

David H. Nutt

DAVID H. NUTT.

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No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, Debtor, *Petitioner*

v.

GEORGE C. MOORE, JR., *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent has charged we were inaccurate in our statement of the case in our petition for writ of certiorari. In view of that charge, we respectfully request the court to allow this reply:

Respondent says we were wrong in stating that Sheffield's letter offered to allow Moore to resume service if he passed the physical examination and safety rules test and that charge, in setting out the language in italics as well as in quotation marks, would lead one to think that the challenged statement was made as a quotation. It was not and

in each of the three instances of which complaint is made, we referred to the particular letter and to its being attached as an exhibit. If we were endeavoring to mislead or misconstrue the letter, we certainly would not refer to an appended copy of it.

We still say that our statement of the letter is correct. In the trial court, counsel for respondent had his client identify the letter and then asked respondent what Sheffield's words "other requirements" referred to. The answer was:

> "Oh, I supposed that they referred to the examination upon the book of rules." (R. 323)

Similar testimony was given by Moore on his deposition. (R. 87) No testimony of a different meaning was given. We submit that our statement was correct. It was based upon respondent's testimony, so he should not complain of it.

Respondent then says that we were inaccurate in our statement that Moore took the position that submission of any question of physical ability to work to a board of three doctors had, by custom, become part of the collective bargaining agreement. The record filed in the Court of Appeals, at page 1013 shows that respondent demanded, and petitioner produced, a letter from B. W. Proctor, of petitioner's personnel office, to Sheffield that Moore should be examined by a three doctor board. Such record at page 304 shows Moore testified that in handling this matter with Assistant General Manager Johnson he stated he would present himself to three doctors. Such record shows at page 316, Moore's appeal to Sheffield, that he wrote that Gregory, former assistant general manager of petitioner, said the mat-

ter should have been handled "in the usual manner of the company and ~~me~~ we each appointing a doctor and the two doctors appointing a third and all concerned abiding by their decision." Respondent offered this letter in evidence (1) to show notice of this claim; (2) on the question of arbitrary action; and (3) "also, your honor, for the purpose of showing that Mr. Moore offered to be examined by any doctor or set of doctors" (R. 318). We believe our statement was, and is, justified by the record.

Lastly, respondent says we were inaccurate in stating that the jury found respondent was disabled when he applied to the superintendent and on other dates, submitted to the jury, prior to May 29, 1952. The verdict form given to the jury and their answers were:

> "1. Was George C. Moore, Sr., physically able to perform his duties as a conductor on or about the following dates?
>
> "(a) February 20, 1951?
>
> "Answer 'yes' or 'no'. Answer: No.
>
> "(b) March 6, 1951?
>
> "Answer 'yes' or 'no'. Answer: No.
> . . . " (R. 217).

Inaccuracies in Respondent's Brief in Opposition to Petition for Writ of Certiorari

Respondent's brief, page 2: "Having recovered from his injury, on February 15, 1951, he presented himself to petitioner's superintendent to return to work . . . " The record: petitioner was not physically able to perform his duties. See jury verdict above.

Respondent's brief, page 2: "Dr. Sublett then made only a most perfunctory examination of plaintiff." The record:

that was plaintiff's contention, but the jury found against Moore's contention of a perfunctory examination and arbitrary treatment of Moore. The verdict form and the answer by the jury were that Dr. Sublett's finding that Moore was unable to resume his duties was not arbitrary (R. 218). Dr. Sublett testified he gave Moore the usual examination (R. 796), that Moore's version of examination was incorrect (R. 828), that he did not examine just on his knowledge of Moore's condition, but gave another physical examination (R. 799), and that he gave Moore the same examination and consideration he would have given any other person (R. 805).

Respondent's brief, page 3:

> " . . . after respondent was examined by other doctors and tendered to petitioner the reports of such examinations showing him to be in good health and sound physical condition, *petitioner then assigned as an additional reason* for denying respondent return to work, the fact that respondent was receiving annuities from the Railroad Retirement Board." (Emphasis added).

The record: the officials involved after the examinations referred to are Johnson, Sheffield and Short. Respondent's testimony is that Johnson told Moore "We are going to stand on the decision of our doctor" (R. 304). No mention is made of any receipt of annuities. Sheffield's decision was communicated by letter appearing at page 34 of the appendix to our petition. It denies his *claim for time lost* because of the annuity, but does not mention the annuity in connection with any return to service. Short's decision was likewise by letter. It did say that Moore could not be returned to work *while* he was receiving annuity on the basis of total and permanent disability, but it did not say Moore

could not return to service after he quit drawing annuity. It referred to Sheffield's letter as to what would be necessary for Moore to resume service and renewed the offer in that letter (R. 331-2). So respondent is incorrect in stating the annuity was assigned as a reason for not allowing Moore to return to work.

Respondent's brief, page 4: "Despite his efforts to have such annuities stopped, the Railroad Retirement Board continued to send them to him;" The record: the trial court would not allow evidence as to Moore's communications with the Board (R. 280, 283, 307), and would not allow evidence or argument as to the good faith of Moore's claim he tried to have such annuity stopped (R. 1046). In pretrial deposition Moore swore that he never unqualifiedly asked the Board to stop his annuity, but just told them he didn't want the annuity if it would interfere with his going back to work. (R. 83-84).

Respondent's brief, page 12: "The record contains considerable undisputed evidence of respondent's efforts to get the Railroad Retirement Board to stop sending him annuity payments as soon as he learned that Petitioner assigned that as an additional reason for denying him the right to return to work". The record: (1) see above that the receipt of such benefits was not assigned by petitioner as a reason for not returning him to work but as a reason for denying his claim for time lost; (2) there was no evidence admitted to show respondent's efforts to stop the annuity. Conversations and communications between respondent and the Board were excluded as hearsay (R. 280, 283, 307). The trial judge would not allow evidence or jury argument as to the good faith of respondent's claimed efforts to stop the annuity (R. 1046). See above that actually respondent didn't try to stop the payments; he just said he didn't want them

if they would prevent or prejudice his right to return to work.

In this connection, petitioner calls attention to the fact that it has never been contended that the acceptance of benefits has a prospective operation to prevent respondent from a later return to work, but rather has contended and does contend that the acceptance of such benefits prevents respondent from claiming damages for not working and from contending that he was able to work *at the time* he accepted disability annuity. In other words, the acceptance today of any annuity payment, made because of disability, precludes respondent from saying he is not disabled today and at all times since the previous payment, but it will not as a matter of law preclude respondent from saying he was able to work at a later date.

Respondent's brief, page 13: " . . . the trial court properly found that respondent had done all that was required of him to have such annuity payments stopped . . . " The record: see above that no evidence as to that was admitted. The court could not make such a finding without evidence. Additionally, the court made no such finding. The record referred to by respondent is not a finding, it is a statement by Judge Allred, early in the trial, that respondent

> "*said*, this morning, that he tried to get loose from it and couldn't. *I don't want to go any farther with that.* He is not bound by what the Railroad Retirement Board said and the jury is not bound by it either." (R. 422, emphasis added).

Certainly if that was an issue being decided by the court, he would not have cut off evidence, as he did, by the statement he didn't want to go farther with it and by his excluding evidence as to it (R. 280, 283, 307).

Respondent's brief, page 14: "Thus it is seen that an employee must return to work before his annuity payments stop." The statute which respondent quoted says "no longer disabled" and "ceases to be so disabled". We submit that such words of the statute are not synonymous with "return to work". In workmen's compensation law particularly, there is a multitude of cases holding that an employee's returning to work does not necessarily mean he is not disabled. So the fact of not working does not mean disability and the fact of working does not mean ability to work.

Respondent's brief, page 16, referring to the verdict that petitioner was arbitrary in not allowing respondent to resume work: "Petitioner does not say—he cannot say that there is not substantial evidence to support the jury's verdict." The record: The first point in our motion for rehearing in the Court of Appeals was:

> "The court erred in holding that the jury verdict that appellant arbitrarily refused to return Moore to service May 29, 1952, was supported by substantial evidence."

One of the points of our trial court motion, after verdict, for judgment was:

> "The answer of the jury to special issue 2(c) that the defendant was arbitrary May 29, 1952, in refusing to permit Moore to resume his duties is without any support in the evidence. On that date, Sheffield offered to allow Moore to return to service if he passed a physical examination. They didn't refuse to allow him to work, much less do so in an arbitrary manner." (R. 1057-8).

We regret our brief in the Court of Appeals is not in the record and so cannot be referred to. Our petition for writ

of certiorari certainly shows we feel there is no support for the jury verdict.

Respondent's brief, page 16: "The jury, on substantial evidence, has found there was a wrongful discharge;" the record: the issue and jury finding referred to was that the defendant's refusal to permit Moore to resume his duties was "arbitrary". No issue was submitted as to whether defendant refused to permit Moore to resume his duties on that date, or whether that was a discharge; the only issue was the arbitrariness of a refusal which the issue assumed to exist. The court instructed the jury that if Moore "was able to go back to work, then refusing to permit him to do so would amount to, in law, a discharge . . . " (R. 1033). Defendant objected to such. (R. 1042-3).

Petitioner regrets the necessity for taking so unusual a step as to tender a reply to a brief in opposition to petition for writ of certiorari. However, in view of the charges and inaccuracies in that brief, we request that this reply be allowed.

Respectfully submitted,

PALMER HUTCHESON,
Attorney for Petitioner,
Houston, Texas

LESLIE S. LOCKETT
Of Counsel
Corpus Christi, Texas

I hereby certify that a copy of the above reply has been mailed to counsel of record for respondent contemporaneously with its filing.

FILED
AUG 22 1955
HAROLD B. WILLEY, Clerk

No. [redacted]339

In the

Supreme Court of the United States

OCTOBER TERM, 1954

GEORGE C. MOORE, SR.,
Cross-Petitioner,

v.

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, Debtor,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit (and Brief in Support of Cross-Petition)

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Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit (and Brief in Support of Cross-Petition)

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Cross-Petitioner respectfully shows:

Opinions of the courts below:

This case originated in the United States District Court, Southern District of Texas, and was appealed to the United States Court of Appeals, Fifth Circuit. The trial judge

filed three memorandum opinions, dated April 29, 1953, November 19, 1953, and April 16, 1954. The opinion of the Court of Appeals was published at .... *F. 2d* .... The memorandum opinions of April 29, 1953, and of November 19, 1953 (without footnotes), were attached to the opinion of the Court of Appeals and published with it.

JURISDICTION OF THE SUPREME COURT

The judgment of the trial court was entered April 12, 1954. The judgment of the Court of Appeals was dated and entered April 22, 1955. Petition for rehearing in the Court of Appeals was denied by that court May 24, 1955.

Jurisdiction to review, by writ of certiorari, the judgments of the trial court and Court of Appeals is conferred on this court by Section 1254 of Title 28 of the United States Code.

Cross-Respondent, as petitioner in his petition for certiorari, having filed a transcript of the record, no additional record to that filed by Cross-Respondent is filed in connection with this cross-petition. (Revised Rules of the Supreme Court of the United States, Rule 21, Section 5.)

QUESTION PRESENTED FOR REVIEW

Whether a railroad employee, employed under a contract for life-time employment, is limited to the recovery of damages for wrongful discharge to damages which have accrued to the time of trial.

STATUTE INVOLVED

This question does not involve the construction or application of any statute. Hence, no statutes are cited.

STATEMENT OF THE CASE

Cross-Petitioner, an employee of Cross-Respondent since November 1, 1929 (R. 12, 25, 242), under a continuing contract of employment (R. 12), was wrongfully discharged on May 29, 1952. (R. 218.) To recover damages for such wrongful discharge, Cross-Petitioner instituted his action in the United States District Court for the Southern District of Texas, Corpus Christi Division, which cause was tried upon Cross-Petitioner's amended complaint, filed March 9, 1953. (R. 23-37.)

By such amended complaint, Cross-Petitioner sued Cross-Respondent for damages for such wrongful discharge, seeking past damages and future damages based upon his life expectancy.

The cause proceeded to trial before the Court with the aid of a jury and was submitted to the jury upon four special issues (R. 217-219, together with the Court's Charge to the Jury. (R. 102, et seq.)

By the Court's charge, he limited Cross-Petitioner to recovery of damages for breach of contract and wrongful discharge to the time of trial (R. 1033), basing such ruling on the holding in *Eubanks v. Galveston, H. & S. A. Ry. Co., 59 S. W. 2d 825.* (R. 1030.) Cross-Petitioner duly and timely objected and excepted to the charge of the Court

limiting recovery to the time of trial, contending that he was entitled to recover damages for loss of future earnings, loss of increased pension rights and annuities, and loss of increased value of his seniority rights, all of which he would have acquired by further service under his contract. (R. 1041.)

Trial to the jury was concluded by their verdict, which was accepted and filed by the Court on January 29, 1954. (R. 217-219.)

Cross-Petitioner duly filed and presented alternative Motions for Judgment (R. 1060), and on April 12, 1954, the trial court rendered judgment for him against Cross-Respondent for the sum of $6,960.00 (R. 1082). Cross-Petitioner duly and timely filed and presented his Motion for Further or New Trial on specified issues (R. 1084-1087), which was overruled by the trial court (R. 1087). Cross-Respondent appealed and Cross-Petitioner cross-appealed to the United States Court of Appeals for the Fifth Circuit (R. 1109-1110), which latter court, by its opinion and judgment, affirmed the appeal and cross-appeal, thereby affirming the ruling of the trial court in limiting Cross-Petitioner's recovery to damages sustained to the date of trial.

At the time Cross-Petitioner entered Cross-Respondent's employ, there existed a collective bargaining contract between the Order of Railway Conductors and Cross-Respondent; such collective bargaining contract formed and became a part of the employment contract between Cross-

Petitioner and Cross-Respondent, and such contract was in effect on January 20, 1954. (R. 190, 192.) Such contract was and is a continuing contract. (R. 12.) There is no compulsory retirement age for conductors employed under such contract; and there is no compulsory retirement age provision in the employment contract of Cross-Petitioner. (R. 193.)

The collective bargaining contract in question contains only one provision pertaining to its term or duration, which reads as follows:

> "The Company will furnish a copy of agreement to all Conductors in service. Same is effective October 1st, 1924, and is effective for a period of one (1) year, and thereafter until 30 days' notice in writing has been given either party to the other, listing changes desired, conferences shall be held immediately upon the expiration of 30 days' notice, unless another date is mutually agreed upon." (R. 36.)

GROUNDS FOR JURISDICTION OF THE TRIAL COURT

The trial court had jurisdiction by virtue of the amount in controversy and diversity of citizenship.

ARGUMENT

Since the collective bargaining contract forming a part of Cross-Petitioner's contract of employment contained no specified term for its continuance and was and is not unilaterally terminable by Cross-Respondent, and specifically provides that it shall continue in effect until termi-

nated or altered by mutual agreement, Cross-Petitioner was and is entitled to recover for wrongful discharge, damages based upon his life expectancy.

In the case of *Eubanks v. Galveston, H. & S. A. Ry. Co., 59 S. W. 2d 825*, the only authority relied upon by the trial court in limiting Cross-Petitioner to the recovery of damages to the time of trial, an entirely different contract was involved.

That case involved a collective bargaining contract which contained a provision for a unilateral termination at the end of any year, by either party giving the other 90 days' prior notice, which provision is quoted on page 826 of the opinion of the Court, in the following language:

> "* * * provided that any party signatory hereto may withdraw at the end of any year upon serving written notice of its intentions to withdraw not less than ninety days prior to the expiration of such year * * *."

The Court then says:

> "The clause quoted expressly provides that either party may withdraw from the contract at the end of any year upon serving written notice of its intentions so to do not less than ninety days prior to the expiration of such year. This clause in the contract precludes any recovery for anticipatory breach for the life expectancy of Eubanks. * * * If Eubanks had an unconditional contract of employment for his natural life, the time of his expected death could be legally ascertained by reference to mortality tables. * * * However, in the case at bar we have absolutely no way of knowing how long the contract made the basis of this

> suit will be kept in operation, except for the current year, and the year following, where the time for notice for withdrawal has expired."

Thus, it is seen that the decision upon which the trial court based his ruling limiting recovery of damages to the time of trial, involved a contract which was unilaterally terminable. The contract here contains no such provision. On the contrary, it expressly provides that it shall continue in effect, subject to changes being mutually agreed to on stipulated procedure. (R. 251.)

Under the rule that where a contract of employment expresses no definite term of employment, its tenure is determined by the intent and understanding of the parties, to be ascertained by consideration of the nature of the employment, usages of the business, the situation of the parties, and the objects in view. *(35 Amer. Jur., Sec. 19, pages 456-7.)* Cross-Petitioner's contract was one for life-time employment, to continue to his voluntary retirement, subject only to discharge for cause.

Such contract is not so indefinite by the uncertainty of Cross-Petitioner's length of life as to preclude recovery of substantial damages for wrongful discharge. The damages recoverable are wages lost to time of trial, plus loss of future wages based on his lifetime expectancy. *Moore v. Illinois Cent. R. Co., 112 Fed. 2d 959, reversed on other grounds, 61 S. Ct. 754, 313 U. S. 630; Nichols v. National Tube Company, 122 Fed. Supp. 726 (no appeal history); Mansell v. Texas & P. Ry. Co. (Tex. Comm. App.), 137 S. W. 2d 997; G. A. Kelly Plow Co. v. London (Tex. Civ.*

App.), 125 S. W. 974; Slabon v. St. Louis Car Co. (Mo.), 102 S. W. 2d 939; Knudsen v. Green (Fla.), 156 Sou. 240; 56 C. J. S. 467, Sec. 58.

Since Cross-Petitioner's contract was not unilaterally terminable upon the part of Cross-Respondent, under the authorities above cited, and by its own provisions, the wrongful discharge of Cross-Petitioner by Cross-Respondent on May 29, 1952, deprived Cross-Petitioner of his contract right to work at his employment from that date, during his life expectancy. As a result thereof, Cross-Petitioner was damaged by reason of being so deprived of the right to work at his employment throughout such time. Cross-Petitioner is entitled to recover in one action, all of his damages occasioned and sustained by such wrongful conduct of Cross-Respondent; thereby, avoiding a multiplicity of suits.

CONCLUSION

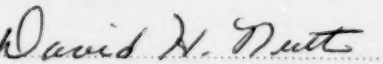
In conclusion therefore, it is respectfully submitted that the District Court and the Court of Appeals erred in applying the law of Texas in limiting and restricting Cross-Petitioner's recovery to damages to the date of trial and in denying him a recovery of future damages calculated upon his life expectancy.

We further conclude that this is a case in which a writ of certiorari should be granted under Rule 19, Section 1(b) of this Honorable Court.

Cross-Petitioner prays that this application for such writ be granted and upon hearing, that portion of the

judgment of the Courts below, limiting and restricting Cross-Petitioner's recovery for wrongful discharge to damages to the date of trial, be reversed.

Respectfully submitted,



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Attorney for Cross-Petitioner.

Of Counsel:
J. MARVIN ERICSON,
Corpus Christi, Texas.

APPENDIX

OPINION OF THE UNITED STATES COURT OF CIVIL APPEALS, FIFTH CIRCUIT.

April 22, 1955

Before HOLMES and RIVES, Circuit Judges, and THOMAS, District Judge.

HOLMES, Circuit Judge: On November 1, 1929, George C. Moore, Sr., appellee, entered the employment of the St. Louis, Brownsville & Mexico Railway Company, of which Guy A. Thompson is Trustee. At the time of his entering such employment, there existed a collective bargaining agreement between said railroad and the Order of Railway Conductors of America, which became part of Moore's contract of employment. Said collective bargaining agreement was a continuing contract for one year after its effective date, and thereafter until 30 days' notice in writing had been given by either party to the other; and said agreement was still in force at the time of the trial of this case.[1] The contract between Moore and the said railway company was made in Texas, was intended to be performed in Texas, and is alleged to have been breached in Texas. No federal question is involved in this controversy as an integral part of the plaintiff's case, though many federal questions are raised in defense thereof. Federal jurisdiction depends

[1] "The Company will furnish a copy of agreement of all Conductors in service. Same is effective October 1st, 1924, and is effective for a period of one (1) year, and thereafter until 30 days' notice in writing has been given by either party to the other, listing changes desired, conferences shall be held immediately upon the expiration of 30 days' notice, unless another date is mutually agreed upon."

solely upon diversity of citizenship between the parties, and the requisite jurisdictional amount.

In January, 1946, appellee was injured on the job, sued appellant, and recovered a judgment against him for damages under the Federal Employers Liability Act. Thereafter, he applied for and was awarded disability payments by the Railroad Retirement Board, and received such payments up to the date of the trial of this case. On February 15, 1951, and at other times, having allegedly recovered from his disability, appellee requested that appellant restore him to active service, which requests, he claimed, were arbitrarily denied; and he brought this suit for damages for his wrongful discharge, which he alleged was accomplished by the railroad's refusal to reinstate him. The plaintiff's cause of action arose under the common law of Texas, and is governed by the law of that state, except to the extent that it may be barred or otherwise affected by federal law.

In *Texas & New Orleans R. Co. v. McCombs, 143 Tex. 257, 183 S. W. 2d 716*, apparently changing the Texas rule in railway employee cases, the Supreme Court of Texas decided that *Moore v. Illinois Central R. Co., 312 U. S. 630*, announced the local law to be applied in similar cases. The *McCombs* decision was prior to *T. & W. Air, Inc. v. Koppal, 345 U. S. 653, 73 S. Ct. 504, 97 L. Ed. 718*, in which the court held that, if the applicable state law requires an employee to exhaust his administrative remedies under his employment contract before filing suit, he must show that he has done so. Nevertheless, regardless of the reason for

the *McCombs* decision, it remains the local law, announced by the highest court in the state. On the authority of this decision, the court below overruled the defendant's second motion to dismiss the complaint, and let the action stand for trial on the following issues:

(1) Was the plaintiff physically able to perform his duties at the time he sought to return to work? (2) did the defendant arbitrarily refuse to permit him to return to work? and (3) the amount of damages that he was entitled to recover.

It is stated in Judge Allred's opinion that, after the filing of briefs on the second motion to dismiss, defendant's counsel conceded that the contract here does not set up the administrative procedure for appeals, but contends that it has been built up by custom. The custom relied on was held by the court below to fall far short of establishing an agreement generally to compulsory submission of such claims to a Board of Adjustment. At most, the court held it merely showed a voluntary submission by the parties of a particular claim.

The court below submitted the case to the jury upon the issues above stated. The verdict rendered in its pertinent part was that the appellee was physically able to perform his duties as conductor on May 29, 1952, and that the appellant's refusal to permit him to resume his duties on or about said date was arbitrary. The jury further found that $6,960 was the amount which would reasonably compensate the plaintiff for loss of employment from May 29,

1952, to the date of the trial, the court having so limited the plaintiff's right to recover future damages in reliance upon *Eubanks v. Galveston, H. & S. A. Ry. Co., 59 S. W. 2d 825*. The court below awarded judgment for the plaintiff against the defendant for said amount, and both sides appealed to this court from said judgment. The appeal of the plaintiff, George C. Moore, Sr., was from that part of the judgment which denied him recovery of damages, to accrue after the date of the trial, for defendant's breach of contract.

We agree with the court below, and with the contentions of appellee, that the remedial provisions of the Railway Labor Act did not require appellee to exhaust his administrative remedy before filing an independent suit for his wrongful discharge; that the findings of the Retirement Board were not conclusive where, as here, the claimant exercised his option to pursue his judicial remedy without first exhausting his administrative remedy; and that appellee was not estopped by having received annuity payments from the Board under the facts and circumstances in this case. The jury, by its verdict, having found that appellee was physically able to perform the duties of his employment as conductor for the defendant on May 29, 1952, and that appellant arbitrarily refused to return him to work on said date, and such verdict being supported by substantial evidence, the court correctly rendered judgment upon such verdict, awarding plaintiff damages for wrongful discharge. The trial court also correctly overruled defendant's motion for an instructed verdict.

We find no reversible error in the record, and think that the judgment appealed from should be affirmed on both appeals. It is so ordered. *Moore v. Illinois Central R. Co., 312 U. S. 630; T. & W. Air, Inc. v. Koppal, 345 U. S. 653; Tex. & N. O. R. Co. v. McCombs, 143 Tex. 257, 183 S. W. 2d 716.* The two memorandums of Judge Allred in this case have not been published, but they are in the record and will be added in an appendix to this opinion.

AFFIRMED.

MEMORANDUM OPINION.
Filed April 29, 1953.
(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, for Plaintiff.

Kleberg, Mobley, Lockett & Weil, *Medical Professional Bldg.*, Corpus Christi, Texas, for Defendant.

Memorandum.

Plaintiff, a resident citizen of Texas, brings this action against defendant, a resident citizen of Missouri. The complaint is in five counts, which really amount to alternative pleadings. Plaintiff alleges:

That he was an employee of defendant under a contract of employment of which the laws of the United States are part, particularly Title 45, Chapters 8 and 9; that on or about October 1, 1924, the railroad entered into a con-

tract with its conductors, represented by the Order of Railway Conductors of America, governing terms and conditions of conductors then in service or who might enter defendant's service, a copy being attached as Exhibit A; that plaintiff entered defendant's employ under such contract about November 1, 1929.

About August 1949, on the advice of his private physician, with defendant's acquiescence, and without resigning or being discharged, plaintiff laid off to follow a regimen recommended by his physician; that about February 15, 1951, having recovered and being in good health for a man of his age, plaintiff presented himself to defendant for resumption of his duties; that defendant, contrary to the contract, refused and still refuses to permit plaintiff to resume and perform his duties; that defendant wrongfully demanded that plaintiff submit to a medical examination by defendant's physician, which requirement was in violation of the contract in which it was stipulated that proper performance of duties would be considered a satisfactory test of physical ability; that this constituted a wrongful discharge of plaintiff to his damage;

In the alternative, plaintiff submitted to an examination by defendant's chief surgeon about February 20, 1951; that the chief surgeon made a written report to defendant, dated March 2, 1951, wrongfully reporting that plaintiff was not physically capable of performing his work, notwithstanding that plaintiff was in good physical condition and capable of performing his duties; that defendant, re-

lying solely on the chief surgeon's report, refused to permit plaintiff to resume performance of his duties which also constituted a wrongful discharge;

Alternatively, after the report of defendant's surgeon plaintiff had himself examined by several competent physicians and surgeons who reported that he was in good physical condition considering his age; that plaintiff furnished these reports to the defendant and requested a hearing which was refused; that this amounted to a wrongful discharge;

Alternatively, about March 6, 1951, when plaintiff received a copy of the chief surgeon's report, he had himself examined by other doctors, including specialists, and again requested a hearing; that this request was granted about May 12, 1951, when plaintiff furnished the reports of his physicians to the defendant and requested that he be given an opportunity to demonstrate his ability to perform his duties; that about August 30, 1951, the defendant refused such request, which amounted to a wrongful discharge;

Alternatively, that after August 30, 1951, plaintiff had other medical examinations made; that about May 1, 1952, he presented all data and information with reference to such examinations to defendant and requested that he be permitted to resume performance of his duties; that about May 29, 1952, defendant attempted to impose conditions upon plaintiff in violation of the contract, among others, that plaintiff agree to waive compensation for the time he had lost by being refused employment theretofore; that this amounted to wrongful discharge;

That plaintiff's physical condition on February 15, 1951, when he originally requested re-employment, was substantially the same as on all other subsequent occasions; that at that time plaintiff had a life expectancy of fourteen (14) years, at least eight of which he would have continued in active duty and the remainder in retirement with benefits; that he had accumulated 22 years seniority and would have acquired 8 more, or a total of 30 years; that his average monthly pay was and would have continued to be $700.00 a month;

Plaintiff sues for $92,600.00 actual damages and $15,000.00 exemplary damages.

Defendant moved for production of documents in connection with plaintiff's application to the U. S. Railroad Retirement Board for disability pension or annuity under the Railroad Retirement Act, setting up that in connection with such application plaintiff made certain statements and representations as to his physical condition and bearing on whether or not plaintiff was defendant's employee at the time of his alleged wrongful discharge.

Plaintiff then filed a motion for production of documents, including various correspondence, allegedly passing between defendant and the Railroad Retirement Board and particularly a copy of a report made by defendant's chief surgeon to the Railroad Retirement Board. Plaintiff opposed defendant's motion for production of documents unless it be conditioned upon defendant's production of the documents plaintiff desires, particularly the report of the chief surgeon to the Board.

Defendant replies that it is willing to produce all of the documents requested by plaintiff excepting the report by the chief surgeon which, defendant claims, it does not have and can not secure; and excepting certain other documents which it has been unable to find after diligent search; and also excepting a demand for production of the record of plaintiff's work time, as requested in Item 15 (since defendant had furnished plaintiff with a full statement of wages paid him;

In connection with plaintiff's demand for production of the chief surgeon's report to the Railroad Retirement Board, plaintiff has attached copies of various letters passing between him and such board with reference to his annuity claim, his request for a copy of the chief surgeon's report and his request that he be given physical examinations by the board which would disclose that he was physically able to return to his duties. Several of these letters show that the board refused plaintiff's request for a copy of the chief surgeon's report on the ground that "it is for use exclusively in the administration of the Railroad Retirement Board."

Thereafter defendant moved to dismiss because:

Prior to September 29, 1949, plaintiff applied to the Railroad Retirement Board for a disability annuity which was granted, and plaintiff is still drawing monthly payments of such annuity; that it has never been set aside and cannot be collaterally attacked in this action; that

plaintiff is estopped, by continued acceptance of the annuity, to contend that he is not disabled and to ask for damages in his action.

While defendant's motion is denominated a motion to dismiss, it is, in reality, a motion for summary judgment, based upon exhibits and plaintiff's deposition.

From the incomplete record before me it appears that:

(1) Prior to May 9, 1947, plaintiff applied to the Railroad Retirement Board for a disability annuity which was denied on or about March 22, 1948, on the ground that he was less than 60 years of age, had less than 20 years service and was not totally and permanently disabled for hire, and did not qualify "under section 2(a) 5 of the Railroad Retirement Act of 1937";

(2) Thereafter plaintiff applied to defendant for reinstatement and compensation for time lost; his union filed a grievance complaint which resulted in his reinstatement; he resumed his services about June 7, 1948, and continued through August 18, 1949.

(3) Sometime prior to September 29, 1949, plaintiff again applied for (or renewed his previous application), to the Railroad Retirement Board for a disability annuity; this was granted by the Board of December 16, 1949 (but effective August 19, 1949); plaintiff is still receiving this annuity, in monthly payments; it was awarded "principally upon the basis of arthritis" and a finding that he was disabled for work in his employment;

(4) On August 8, 1951, plaintiff wrote the Board that he was anxious to resume his duties, and believed he was physically able to do so; that on March 2, 1951, defendant's chief surgeon had recommended that plaintiff not resume his duties; that thereafter he had been examined by doctors in Houston, San Antonio and Kingsville whose findings differed from the chief surgeon's; plaintiff, therefore, requested the Board to have him examined to see if he still was entitled to receive his annuity.

(5) On December 26, 1951, the Board advised that, after considering general and specialized examinations, including the one of March 2, 1951, defendant's chief surgeon, they still considered him "permanently disabled for work" in his regular occupation; that the Board had no jurisdiction over employment practices of the railroads and the question of re-employment was purely a matter between plaintiff and his former employer;

(6) Plaintiff wrote Senator Lyndon Johnson who, in turn, took the matter up with the Board; Senator Johnson was advised by the Board on July 3, 1952, that their regulations provided that a recipient of disability annuity report to them if he had recovered; and, that in view of plaintiff's letter to the Senator, the Board was arranging to have specialized examinations made of him to determine if he had recovered and was "no longer entitled to the annuity benefits which he is now receiving"; at the same time the Board requested plaintiff to report to the Veteran's Administration Regional Office at San Antonio for the examination;

(7) On July 12, 1951, plaintiff wrote the Board that apparently the request for re-examination had been made "by some one other than myself"; that the Board had had plaintiff examined at his own request, in October, 1951, by Dr. A. C. Jones of Kingsville and had advised that his standing would remain unchanged; that he did not object to the examination but would like to know who made the request and for what purposes;

(8) The examination was made at San Antonio and, on August 19, 1952, the Board advised plaintiff as follows:

"Our records show that you were awarded an annuity principally upon the basis of arthritis and that the annuity has been continued uninterrupted since the award was approved in your favor. The report received from the Veterans Administration Hospital which covers a series of specialized examinations shows substantially the same disability which was present at the time your claim for a disability annuity was approved. The x-ray showed a curvature of the cervical spine, a distinct lipping on the lower cervical vertebrae, a slight lipping on the lower dorsal vertebrae and calcification in the lower dorsal interspaces. Upon the basis of these x-ray studies, a diagnosis of arthritis of the spine was confirmed and continued in effect. Under this decision no change is indicated in the disability status of your claim insofar as your right to receive a disability annuity is concerned. As previously stated, the Board has no jurisdiction over the question of whether the employer returns you to work in your regular occupation."

(9) Plaintiff tried several times to secure a copy of the report to the Board of defendant's chief surgeon as to his findings, but the Board refused to furnish it on the ground that "any report of physical examination, regardless from whom it may have been received, is for use exclusively in the administration of the Railroad Retirement Act."

Plaintiff was granted his annuity in 1949 under the provisions of 45 U. S. C. A. 228b(a) 4(i), upon a finding that his permanent physical or mental condition was such as to be disabling for work in his regular occupation, having completed 20 years of service, Section (a) 4 further provides, in part:

"The Board, with the cooperation of employers and employees shall secure the establishment of standards determining the physical and mental conditions which permanently disqualified employees for work in the several occupations in the railroad industry, and the Board, employers and employees shall cooperate in the promotion of the greatest practicable degree of uniformity in the standards applied by the several employers. *An individual's condition shall be deemed to be disabling for work in his regular occupation if he will have been disqualified by his employer because of disability for service in his regular occupation in accordance with the applicable standards so established* * * *." (Emphasis supplied.)

Section (a) 5, provides in part:

"Such satisfactory proof shall be made from time to time as prescribed by the Board, of the disability provided for

in paragraph 4 or 5 of this subsection *and of the continuance of such disability (according to the standards applied in the establishment of such disability)* until the employee attains the age of sixty-five. If the individual fails to comply with the requirements prescribed by the Board as to proof of the *continuance of the disability* until he attains the age of sixty-five years, his right to an annuity shall, except for good cause shown to the Board, cease, but without prejudice to his rights to any subsequent annuity to which he may be entitled. If before attaining the age of sixty-five an employee in receipt of an annuity under paragraph 4 or 5 of this subsection is found by the Board to be no longer disabled as provided in said paragraphs his annuity shall cease upon the last day of the month in which he ceases to be so disabled. An employee, in receipt of such annuity, who earns more than $75 in service for hire, or in self-employment, in each of any six consecutive calendar months, shall be deemed to cease to be so disabled in the last of such six months; and such employee shall report to the Board immediately all such service for hire, or such self-employment. If after cessation of his disability annuity the employee will have acquired additional years of service, such additional years of service may be credited to him with the same effect as if no annuity had previously been awarded to him." (Emphasis supplied.)

It is defendant's contention that the Board has jurisdiction, not only to determine the existence of a claimed disability originally, but, once found, whether the disability continues from time to time if it is called in question; that

the Board's decisions are not subject to review by other administrative agencies or accounting officers, under 45 U. S. C. A. 228j (b) 1; and can only be reviewed by the Courts, under 228k of Title 45, by a proceeding brought for that purpose, upon a showing that it is clearly and manifestly wrong. There is no doubt that such is the rule in cases where the Board denies an application for an annuity; the order will stand if supported by substantial evidence and not in violation of law. Gardner v. Railroad Retirement Board, 5th Cir., 148 F. 2d 935. Watts v. Railroad Retirement Board, 5th Cir., 150 F. 2d 113; Welborn v. Board, 5th Cir., 151 F. 2d 448; Squires v. Board, 5th Cir., 151 F. 2d 182; Wheeler v. Board, 8th Cir., 184 F. 2d 173; Robinson v. Board, 8th Cir., 184 F. 2d 703.

Unquestionably, the same rule would apply in an action by an employee where the Board discontinued an annuity upon a finding that the disability no longer existed. But does the statute require such a direct proceeding for judicial review where the Board has found that the disability still exists? As shown by the emphasized portions of the statute quoted above, the Board has power to require satisfactory proof from time to time of the continuance of the disability; and, if the beneficiary fails to comply with such requirement, or if the Board finds that he is no longer disabled, his annuity ceases. Subsection 228i authorizes recovery and adjustments of annuities erroneously paid; and protects from liability certifying or disbursing officers acting in good faith.

This is an anomalous, indeed a peculiar case. It would be supposed that ordinarily the Board would accept an annuity recipient's claim that he had recovered and stop paying him an award he says he does not want. All the reported cases are complaints that the Board has wrongfully denied an annuity to a claimant, not that it had continued one he no longer is entitled to.[1] An additional oddity is the fact that here the employee continues to accept his annuity although he says he is not entitled to, and does not want, it.

As pointed out, the statute grants to the Board jurisdiction and broad powers to determine disability originally and, from time to time, whether it still exists. 45 U. S. C. A. 288j, (b) 1 provides that the Board "shall have and exercise all the duties and powers necessary to administer sections 228a-228r." Subsection 228k provides that decisions of the Board determining the rights and liabilities of any person[2] under sections 228a to 228c-1 "shall be subject to judicial review in the same manner," etc., as under chapter 11 (of the Railroad Retirement Act, 45 U. S. C. A. 355f) by filing a petition for review against the Board, in the district Court where the claimant re-

[1]Utah Copper Co. v. Railroad Retirement Board (D. C.) 41 Fed. Supp. 763, aff. 10th Cir., 113 F. 2d 358; Railroad Board v. Daiquesne Co., 326 U. S. 446, and Dispatch Shops v. Railroad Retirement Board, 2nd Cir., 154 F. 2d 417, were actions by employers to set aside Board holdings that they were employers under the act.

[2]Under this, I suppose, defendant could have petitioned for a judicial review of the continuance of this annuity, since "person" is defined in subsection 228n to include a corporation; and in old subsection 228k, a part of the Act of 1937, the right to Court relief was accorded to "any employee or other person aggrieved."

sides, within one year. And, as held in the cases, the Board's decision can only be set aside where not supported by substantial evidence and in violation of law.

Notwithstanding the broad language of the statute, I doubt that Congress contemplated that there ever would be an appeal by an annuity beneficiary for judicial review of an order awarding him a continuance of his annuity on the ground that his disability had ceased. Among other reasons for this view, in addition to the anomaly of the situation itself, are the following: (1) the provisions for recovery or adjustment of annuities erroneously paid; (2) the fact that subsection 228k provides that proceedings for review of a decision with respect to an annuity must be commenced within one year after the decision is entered upon the Board's records and communicated to the claimant; and (3) the provisions of subsection 228b(b), reading as follows:

"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; *but this requirement shall not apply to the individual mentioned in subdivision 4 and subdivision 5 of subsection (a) prior to attaining age sixty-five.*" (Emphasis supplied.)

Plaintiff, coming within the foregoing emphasized exception, says that the effect of the Board's refusal to find that he has recovered and to discontinue his annuity is to

compel him to relinquish his right to return to his employment. The Board disclaims jurisdiction of the question of re-employment saying in its letters, that this is a matter between plaintiff and defendant. Nevertheless, the fact remains that plaintiff invoked the Board's jurisdiction originally, reinvoked it on the question of his recovery and continues to accept the benefits of an award, based upon a finding that he is, and has been since 1946, disabled for work in the very employment he says he is now able to resume. The Board made its findings over plaintiff's protests, just as it made findings that certain companies were employers in the cases cited in footnote 1, supra. Plaintiff's whole argument here that the Board acted arbitrarily and in violation of law; that its decision was the result of collusion with, or procurement of, defendant.

Plaintiff had the right to make those contentions and have them decided in a direct proceeding for review brought under subsection 355f. But the finding, upon which the annuity is based, is not res judicata which does not apply to administrative decisions. 50 C. J. 3. 29, sec. 606. So the situation is not unlike one where a claim for total permanent incapacity is made under the Workmen's Compensation laws and it is shown that the claimant had been found to be so incapacitated in a previous action. It is a question of fact whether he had recovered from the previous condition.

Defendant's plea of estoppel is based upon the foregoing and the fact that plaintiff has continued to collect his

annuities. Ordinarily of course, in order to create an estoppel, the party invoking the doctrine must have acted or been misled to his prejudice; but estoppel frequently is based upon acceptance or retention of benefits, a branch of the rule against inconsistent positions, referable to the principle of election rather than to that of equitable estoppel. 19 Am. Jur. 682. At this time the record is not sufficiently developed for me to say that plaintiff is so estopped.

The appellate Courts repeatedly have cautioned trial Courts to carry motions for summary judgment along with the case until all the evidence is in, especially in close cases, such as this one. I shall do that here.

Defendant's motion for summary judgment, therefore, is overruled and will be carried along with the case.

As indicated upon pre-trial, both motions for production of documents are granted as to all documents the parties are able to secure; excepting that defendant will not be required to produce the record of plaintiff's work time, as requested in item 15.

The Clerk will notify counsel.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas.
April 29, 1953.

MEMORANDUM OPINION

Filed November 19, 1953

(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, for Plaintiff.

Kleberg, Mobley, Lockett & Weil, Jones Bldg., Corpus Christi, Texas, for Defendant.

Memorandum

Action by plaintiff for wrongful discharge. Reference is here made to a memorandum dated April 29, 1953, overruling defendant's motion for summary judgment based upon plaintiff's failure to file a direct proceeding for a judicial review of a decision of the United States Railroad Retirement Board.

Defendant has filed a second motion to dismiss based upon plaintiff's failure to allege exhaustion of his remedies under the employment contract between the railroad and plaintiff's union. Article 21 of such contract provides that conductors shall not be unjustly discharged or disciplined; that in case a conductor believes he has been unjustly discharged or disciplined, he shall have the right within ten days to make complaint in writing, and, upon request, be granted a hearing within ten days; that if dissatisfied with the decision he may appeal to "higher authority."

Defendant bases his motion upon a recent decision of the U. S. Supreme Court in Transcontinental & Western Air, Inc. v. Koppal, 346 U. S. 653, 73 S. Ct. 907, 97 L. Ed. 863, in which the Court amplifies Moore v. Illinois Central R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089; and holding that, if the applicable State Law requires an employee to exhaust his administrative remedies under his employment contract before instituting Court action, he must show that he has done so Defendnat points to the Texas rule announced in the cases[1] requiring a discharged or dissatisfied employee to exhaust his remedies, if required b the contract, before resorting to the Courts.

Defendant frankly concedes that a later decision by the Texas Supreme Court, Texas & New Orleans R. Co. v. McCombs, 143 Tex. 257, 183 S. W. 2d 716, seemingly changes the Texas rule in railway employee cases; but pointing to the fact that the McCombs decision was prior to the Supreme Court decision in the Koppal case, and that the Texas Supreme Court did not discuss the general rule in Texas, defendant insists that the Texas Supreme Court apparently decided McCombs on the theory that Moore v. Illinois Central announced the law to be applied to railroad employment cases regardless of the local law.

It is true that the Texas Supreme Court decided the McCombs case in the light of the Moore case and "for the

[1] Among others, Wyatt v. Kansas City Southern R. Co. (Tex. Civ. App.), 101 S. W. 2d 1082; Swilley v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.), 96 S. W. 2d 105; Cousins v. Pullman Co., 72 S. W. 2d 356; Matlock v. Gulf C. & S. F. Ry. Co. (Tex. Civ. App.), 99 S. W. 2d 1056; St. Louis, B. & M. Ry. Co. v. Booker (Tex. Civ. App.), 5 S. W. 2d 856. See also 7 Tex. Jur., Ten Year Supp. 195, sec 114a.

sake of uniformity of decision"; and stated that it "should follow the Moore case rather than the decisions of the Court of Civil Appeals." The Texas Supreme Court expressly refers to Wyatt v. Kansas City So. Ry. Co., supra and "similar decisions."

Regardless of the basis of the McCombs decision, it remains the local law, announced by the highest Court in this State in railroad employee cases. The employment agreement in the McCombs case contained stronger language and more specific details as to procedure for seeking relief than the one here involved. The Texas Supreme Court held that while the McCombs agreement gave him the right to appeal to the highest company offials, it did not require him to do so; and that there was nothing in that agreement that required the employee to seek administrative relief as a condition precedent to Court action. While the case dealt with a claim for overtime, there is no distinction in principle from a like provision dealing with unlawful discharge.

After the filing of briefs on the second motion to dismiss, defendant's counsel concedes by letter that the contract here involved does not set up the administrative procedure for appeals but contends that it has been built up by custom. In support of this contention counsel has furnished the Court with a copy of an award and opinion by "Special Board of Adjustment No. 24, Missouri Pacific Lines in Texas and La. v. BLF & E, ORC and BRT, Docket No. 101, Case No. 116, 915-5," involving a claim by the estate of Conductor M. C. Barnes, an employee of defend-

ant, for time lost after he had reported back for duty and before his application for annuity retirement had been granted by the Railroad Retirement Board. The Special Board of Adjustment was composed of a chairman, a representative of the employee and a representative of the employer. This falls far short, however, of establishing an agreement generally as to compulsory submission of such claims to a Board of Adjustment. At most, it merely shows a voluntary submission of the Barnes claim by the parties in the nature of arbitration.[2]

Defendant's second motion to dismiss, therefore, is overruled. The Clerk will notify counsel.

The action will stand for trial on the following issues: (1) was plaintiff physically able to perform his duties at the time he sought to return; (2) Did defendant arbitrarily refuse to permit him to return to work; and (3) If so, the amount of damages. Defendant's first motion to dismiss will be carried along with the case.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas,
November 19, 1953.

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[2]The decision, however, is interesting and probably decisive here of one disputed question raised by plaintiff's pleading, quoted in the original memorandum, this "proper performance of duty would be considered a satisfactory test of physical ability" to do so. Barnes had applied for and was granted a leave of absence because of his health. Thereafter, and before expiration of his leave, Barnes reported back for duty. Defendant's superintendent referred him to the Chief Surgeon for physical examination. He was examined by a physician at the request of the Chief Surgeon, who found that, unless Barnes improved considerably in the future, he should not be put back to work. Defendant's superintendent refused to permit Barnes to return to work until he reported to the

MEMORANDUM OPINION

Filed April 6, 1954

(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, for Plaintiff.

Kleberg, Mobley, Lockett & Weil, Jones Bldg., Corpus Christi, Texas, for Defendant.

Memorandum

Action by plaintiff for damages for discharge from employment. Reference is here made to a memorandum dated April 29, 1953, overruling defendant's motion for sum-

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Chief Surgeon for physical examination and received his okay. Barnes failed to do this.

Later he made application to the Railroad Retirement Board for retirement. This was granted. Meantime, however, he had filed claim for time lost between the date he reported back for service and the effective date of his retirement annuity. The Special Board, after reviewing all the facts, denied the claim, holding that where the evidence showed serious doubt as to a conductor's physical capacity to satisfactorily perform his duties, the carrier's request for physical examination by the Chief Surgeon was not unreasonable.

That decision also disposes of the contention pleaded and vigorously asserted by plaintiff in his original brief, i.e., that a provision appearing in an agreement between the I. & G. N. Railroad Co. and its employees has become a part of the agreement with St. L. & B. & M. employees. The provision was: "The proper performance of their duties will be considered satisfactorily test of physical ability of all employees now in service." The decision of the Special Board of Adjustment expressly find that this provision does not apply to defendant's employees; that: "That rule is not contained in the agreement covering working conditions of conductors on the St. Louis, Brownsville and Mexico, the railroad here involved. A review of St. L. B. & M. agreement will confirm this fact. The I. G. N. and the St. L. B. & M. agreements are two separate and distinct agreements, covering two separate properties insofar as rules governing the working conditions of employees in train and engine service is concerned."

On brief and upon pre-trial plaintiff's counsel condeded that the written agreement, attached to his complaint, did not contain the quoted provision; but, insisted, as did Barnes' estate before the Special Board, that it had been incorporated in a 1947 conference in Houston, "with an understanding in regard to servicemen returning from the government service." In any event, plaintiff does not claim to be a returning serviceman.

mary judgment because plaintiff did not file a direct proceeding for judicial review of the decision of United States Rail Retirement Board finding that he was still unable to work; and to a memorandum of November 19, 1953, overruling a second motion to dismiss because of plaintiff's failure to allege that he had exhausted his remedies under an employment contract between the railroad and plaintiff's union.

Plaintiff had alleged, by alternative counts, that he was physically able to perform his duties as a conductor on or about (a) February 20, 1954; (b) March 6, 1951; (c) July 30, 1951; (d) May 29, 1952; but that defendant arbitrarily refused to permit him to resume his duties upon each and all of such dates. A jury found that plaintiff was able to perform his duties on or about May 29, 1952, and that defendant arbitrarily refused to permit him to resume his duties at that time. The jury awarded plaintiff $6,960 for his damages, measured by his probable earnings between May 29, 1952 and the date of trial. The recovery was limited to his probable earnings to the time of trial, under Eubanks v. Galveston, H. & S. A. Ry. Co. (Tex. Comm. App.), 59 S. W. 2d 825.

Plaintiff moves for judgment in excess of the amount awarded by the jury, and, alternatively, for judgment on the verdict Defendant moves for judgment non obstante veredicto based upon (a) the motions to dismiss heretofore urged, overruled and carried along with the case; (b) the fact that, notwithstanding plaintiff's alternative allegations as to his physical ability on the various dates,

he had actually applied for re-instatement in February 1951 and had been rejected then; that the subsequent dates were in actually appeals to a higher authority, not new applications to return to work; that there was, in reality, only one application to return to work (that of February 1951) and, since the jury found that plaintiff was not physically able to perform his duties in February 1951, he is not entitled to recover upon a finding that he was able to perform his duties May 29, 1952.

Article 21 of the employment contract provided that conductors should not be unjustly discharged or disciplined; that a conductor who believed that he had been unjustly discharged or disciplined should have the right, within ten days, to make complaint in writing to the railroad and be granted a hearing within another ten days; that, if dissatisfied with the decision, he could appeal to higher authority.

As pointed out in the memorandum of November 19, 1953, this provision for application, appeal, etc. did not set up administrative procedure for appeals. It was silent as to what official of the railroad an application to resume employment should be made, or an appeal taken. The facts here show that neither party concerned themselves with technical details as to procedure; and, while plaintiff in his letter to Sheffield, dated May 1, 1952, referred to his application as an "appeal for reconsideration," yet, after the initial refusal by defendant's chief surgeon Sublett, plaintiff continued to submit to additional medical exami-

nations and furnished additional evidence as to his physical condition to defendant in support of each effort he made to return to work.

Defendant's motions will be overruled and plaintiff's alternative motion for judgment on the verdict is granted. A judgment, is being entered in accordance with the verdict. The Clerk will notify counsel.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas,
April 6, 1954.

Office - Supreme Court, U. S.
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JOSEPH F. SPANIOL, Clerk

No. 359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

GEORGE C. MOORE, SR., *Cross-Petitioner*,

v.

GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, DEBTOR, *Cross-Respondent*

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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No. 339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

GEORGE C. MOORE, SR., *Cross-Petitioner*,

v.

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, Debtor, *Cross-Respondent*

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Cross-Respondent, Guy A. Thompson, Trustee, The St. Louis, Brownsville & Mexico Railway Company, files this brief in opposition to the cross-petition for writ of certiorari filed by cross-petitioner George C. Moore, Sr.

In the cross-petition, the statement is made "petition for rehearing in the Court of Appeals was denied by that court May 24, 1955". That motion for rehearing was filed by

cross-respondent, Guy A. Thompson, Trustee, and did not ask for any review of the holding of the Court of Appeals sought to be reviewed by this cross-petition. The only holding by the Court of Appeals complained of by cross-petitioner was in its opinion and judgment April 22, 1955. The cross-petition was filed more than ninety days after April 22, 1955, and therefore, is too late under Rule 22 of this Court.

The fact that the Court of Appeals was asked (by cross-respondent) to change its holding in some matter other than that sought to be reviewed in this cross-petition does not extend the time for filing such. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206.

In the cross-petition there are two fundamental assumptions, each of which is erroneous: (1) that the collective bargaining agreement "is not unilaterally terminable" or, differently stated by cross-petitioner, that such agreement continues "until terminated or altered by mutual agreement" or that cross-petitioner's contract was one for lifetime employment; and (2) that cross-petitioner could recover damages for any time after the trial.

The language of the contract (R. 251) is that the contract shall be effective for one year after October 1, 1924 "and thereafter until 30 days' notice in writing has been given either party to the other . . . " From the fact that the provision for such notice requires a listing of changes desired and provides there shall be conferences, cross-petitioner reasons that the above specified period is lengthened until the parties agree that there shall be, or shall not be, changes. But no words expressly or impliedly providing for that are used. According to the contract, it terminates thirty

days after either party gives the other notice. If the parties had intended that the contract would continue while negotiations as to desired changes were had, it would certainly have been easy to add words to that effect. They did not so provide. The court is bound to enforce the contract agreed upon and cannot make a contract for the parties.

Additionally, Texas law is well settled that damages for breach of an employment contract may be recovered only to the date of trial. Under *Trans-Continental and Western Air, Inc. v. Koppal,* 345 U.S. 653, if the employee wants to claim damages rather than reinstatement and loss of time, he may resort to a state recognized cause of action, but subject to all limitations in such state law.

In addition to *Eubanks v. Galveston, H. & S.A. Ry. Co.,* (Tex. Comm. App.), 59 S.W. 2d 825, followed by the trial court and the Court of Appeals in limiting cross-petitioner's damages to those up to the time of trial, we call the court's attention to other announcements of Texas law to that effect. In 29 *Texas Jurisprudence,* page 36, Master and Servant, Section 19, it is said:

> "*Measure of damages* . . . The method of computing the damages suffered by one who was employed on a salary is to debit the employer with the whole amount due from the pay-day before discharge down to the date of trial (if the suit is brought before the end of the term) or down to the end of the term (if the suit is brought after the end of the term); . . . "

In addition to the *Eubanks* case, the text cites *Stolz v. Wells* (Tex. Civ. App.), 43 S.W. 2d 163 (no writ history) which holds that where an employment contract is terminable on notice, damages for its breach are limited to those accruing

during the period for notice specified in the contract even though no notice of termination was given. Trial was after the notice period.

A more recent case so limiting damages is *Niles v. Parsons* (Tex. Civ. App.), 239 S.W. 2d 740 (no writ history) holding that the maximum damages recoverable for breach of an employment contract are for the period from breach to the date of trial, even though the contract is for a definite period, if the trial is before the date set in the contract for its expiration. The court said:

> "We agree with the contention of appellant that the maximum recoverable by appellee herein is the sum he would have received under the contract of employment from the time it was breached to the date of trial and *not to the end of the contract period.* 29 *T. J.*, p. 35, Sec. 19; *Lichtenstein v. Brooks*, 75 Tex. 196, 12 S.W. 975; *Southern Properties, Inc. v. Carpenter* (Tex. Civ. App.), 300 S.W. 963." (Emphasis added.)

See also *Lone Star Cotton Mills v. Thomas* (Tex. Civ. App.), 227 S.W. 2d 300. The agreement there provided that it was effective for one year and it

> "shall automatically continue beyond the said date for one year or more unless either party to the agreement gives the other party hereto notice of its desire to alter, revise, or terminate this agreement at least thirty days prior to any anniversary date." (227 S.W. 2d at 305-6).

In a suit for damages, the court said at page 309:

> "The case of Eubanks v. Galveston H. & S. A. Ry. Co., Tex. Comm. App. 59 S.W. 2d 825 is deemed to have some bearing here. It was there held that a contract

having a marked similarity was not a contract of life employment. It is thought it is a fair inference from the case that damages may be recovered to the date of trial unless the contract had been sooner terminated in accordance with its provisions. It is thought that damages to the date of trial would be all that plaintiff would be entitled to recover."

Cross-respondents therefore say that the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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